



CITY OF NEWPORT BEACH HEARING OFFICER AGENDA

**Newport Beach City Hall, Council Chambers
3300 Newport Boulevard
February 1, 2012 – 9:30 a.m.**

Judge John C. Woolley, Hearing Officer

Staff Members:

**Brenda Wisneski, AICP Deputy Community Development Director
Javier Garcia, AICP Senior Planner**

1) CALL MEETING TO ORDER

2) PUBLIC HEARINGS

Item No. 1. Abatement Period Extension Request - 500 Jasmine Avenue - Abatement Period
Extension No. PA2011-012
500 Jasmine Avenue Council District 6

Summary: Application for extension of the abatement period in accordance with Section 20.38.100 of the Newport Beach Municipal Code. The property is occupied by a 1,050 square foot office building. No new development or construction is associated with this request. The applicant requests to allow the existing nonresidential use to continue for an extended period of time without abatement. The property is located in the R-2 (Two-Unit Residential) District.

Recommended
Action:

- 1) Conduct public hearing; and
- 2) Hearing Officer determination. Options include continuance, approval of Abatement Period Extension No. PA2011-012 with conditions, or denial of abatement period extension. In the latter two cases, the Hearing Officer may instruct staff to prepare a Resolution for signature.

CEQA

Compliance: The project is exempt from environmental review pursuant to Section 15301, Class 1 (Existing Facilities) of the Implementing Guidelines of the California Environmental Quality Act.

This hearing is subject to the Ralph M. Brown Act. Among other things, the Brown Act requires that the Hearing Officer's agenda be posted at least seventy-two (72) hours in advance of each regular hearing and that the public be allowed to comment on agenda items before the Hearing Officer and items not on the agenda but are within the subject matter jurisdiction of the Hearing Officer. The Hearing Officer may limit public comments to a reasonable amount of time, generally three (3) minutes per person.

It is the intention of the City of Newport Beach to comply with the Americans with Disabilities Act ("ADA") in all respects. If, as an attendee or a participant at this hearing, you will need special assistance beyond what is normally provided, the City of Newport Beach will attempt to accommodate you in every reasonable manner. If requested, this agenda will be made available in appropriate alternative formats to persons with a disability, as required by Section 202 of the Americans with Disabilities Act of 1990 (42 U.S.C. Sec. 12132), and the federal rules and regulations adopted in implementation thereof. Please contact the Community Development Department at least forty-eight (48) hours prior to the hearing to inform us of your particular needs and to determine if accommodation is feasible at 949-644-3200.

Item No. 2. Abatement Period Extension Request – 3355 Via Lido- Abatement Period Extension No. PA2011-153
3355 Via Lido Council District 1

Summary: Request for extension of the required Abatement Period specified by Section 20.38.100 of the Newport Beach Municipal Code. The property is occupied by a 31,413 square-foot office building. No new development or construction is associated with this request. The applicant requests to allow the existing nonresidential use to continue for an extended period of time without abatement. The property is located in the RM (2178) (Multi-Unit Residential) District.

Recommended

Action: 1) Conduct public hearing; and
2) Hearing Officer determination. Options include continuance, approval of Abatement Period Extension No. PA2011-153 with conditions, or denial of abatement period extension. In the latter two cases, the Hearing Officer may instruct staff to prepare a Resolution for signature.

CEQA

Compliance: The project is exempt from environmental review pursuant to Section 15301, Class 1 (Existing Facilities) of the Implementing Guidelines of the California Environmental Quality Act.

Item No. 3.. Abatement Period Extension Request – 1499 Monrovia Avenue- Abatement Period Extension No. PA2011-152
1499 Monrovia Avenue Council District 2

Summary: Request for extension of the required Abatement Period specified by Section 20.38.100 of the Newport Beach Municipal Code. The property is occupied by a 17,000 square-foot office building. No new development or construction is proposed as a part of this request. The applicant requests to allow the existing nonresidential use to continue for an extended period of time without abatement. The property is located in the RM (2420) (Multi-Unit Residential) District.

Recommended

Action: 1) Conduct public hearing; and
2) Hearing Officer determination. Options include continuance, approval of Abatement Period Extension No. PA2011-152 with conditions, or denial of abatement period extension. In the latter two cases, the Hearing Officer may instruct staff to prepare a Resolution for signature.

CEQA

Compliance: The project is exempt from environmental review pursuant to Section 15301, Class 1 (Existing Facilities) of the Implementing Guidelines of the California Environmental Quality Act.

3) **PUBLIC COMMENTS ON NON-AGENDA ITEMS**

Public comments are invited on non-agenda items generally considered to be within the subject matter jurisdiction of the Hearing Officer. Speakers must limit comments to three (3) minutes. Before speaking, we invite, but do not require, you to state your name for the record. The Hearing Officer has the discretion to extend or shorten the speakers' time limit on non-agenda items, provided the time limit adjustment is applied equally to all speakers. As a courtesy, please turn cell phones off or set them in the silent mode.

4) **ADJOURNMENT**

If in the future, you wish to challenge in court any of the matters on this agenda for which a public hearing is to be conducted, you may be limited to raising only those issues which you (or someone else) raised orally at the public hearing or in written correspondence received by the City at or before the hearing.

Any writings or documents provided to the Hearing Officer regarding any item on this agenda will be made available for public inspection in the office of the Planning Division located at 3300 Newport Boulevard, during normal business hours.

APPEAL PERIOD: An appeal may be filed with the Director of Community Development or City Clerk, as applicable, within fourteen (14) days following the date the action or decision was rendered unless a different period of time is specified by the Municipal Code (e.g., Title 19 allows ten (10) day appeal period for tentative parcel and tract maps, lot line adjustments, or lot mergers). For additional information on filing an appeal, contact the Planning Division at 949 644-3200.

ABATEMENT EXTENSIONS

500 JASMINE AVENUE (PA2011-012) – Yeo

3355 VIA LIDO (PA2011-153) – New Port Townhomes LLC

1499 MONROVIA AVENUE (PA2011-152) - Kaplan

HEARING OFFICER
Public Hearing
FEBRUARY 1, 2012





VICINITY MAP – 500 JASMINE AVENUE

FINDINGS AND RECOMMENDATION

500 JASMINE AVENUE (Office Building)

FINDINGS:

- One year is not an adequate period of time.
- The property became nonconforming in 2006, 6 years ago.
- The 1,050 square-foot building is not suitable for conversion to residential use without significant demolition and building new.
- The property is located in an area with other nonresidential uses; including office, restaurant and retail uses across Jasmine Avenue and on Coast Highway and poses no negative impact or harm to the neighborhood.

RECOMMENDATION:

- An abatement extension of ten years (February 1, 2022) is appropriate in this case.



VICINITY MAP – 3355 VIA LIDO

FINDINGS AND RECOMMENDATION

3355 VIA LIDO (Office Building)

FINDINGS:

- One year is not an adequate period of time to obtain building permit entitlement through the City and the Coastal Commission for the construction of the new residential project..
- The property became nonconforming in 2006, 6 years ago and conformed for 49 years prior to that time.
- The 31,413 square-foot office building is not suitable for conversion to residential use without significant demolition and building new.
- The property is located in an area with other nonresidential uses and churches; including office, restaurant and retail uses, and poses no negative impact or harm to the neighborhood.
- The relocation of the existing 31,413 square feet of tenant space would be costly and difficult, since there are limited numbers of comparable vacant storefront units or buildings available in the vicinity.

RECOMMENDATION:

- An abatement extension of ten years (February 1, 2022) is appropriate in this case.



VICINITY MAP – 1499 MONROVIA AVENUE

FINDINGS AND RECOMMENDATION

1499 MONROVIA AVENUE (Office Building)

FINDINGS:

- One year is not an adequate period of time.
- The property became nonconforming in 2006, 6 years ago and conformed for 49 years prior to that time.
- The 17,000 square-foot office building is not suitable for conversion to residential use without significant demolition and building new.
- The property is located in an area with other and public institutions; including the Coastline Community College Project and the proposed Banning Ranch Project and poses no negative impact or harm to the neighborhood.
- The relocation of the existing tenant is difficult since there are no buildings of comparable size in the Newport Mesa Area.

RECOMMENDATION:

- An abatement extension of ten years (February 1, 2022) is appropriate in this case.

**CITY OF NEWPORT BEACH
HEARING OFFICER STAFF REPORT**

February 1, 2012 Meeting

Agenda Item 1

SUBJECT: Abatement Period Extension - 500 Jasmine Avenue - (PA2011-012)

APPLICANT: Ron and Birgitta Yeo, Property Owners

PLANNER: Javier S. Garcia AICP, Senior Planner
(949) 644-3206, jgarcia@newportbeachca.gov

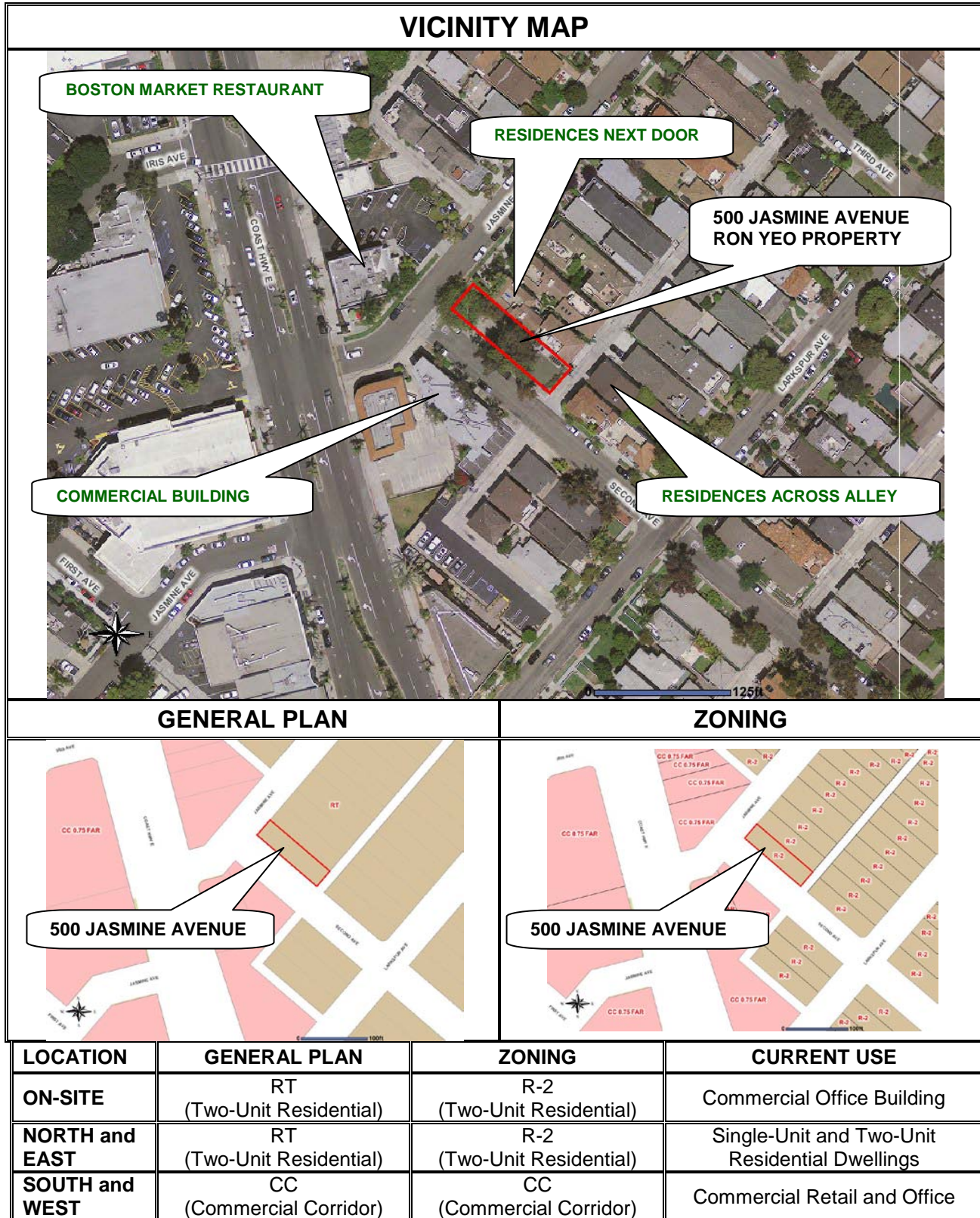
PROJECT SUMMARY

Application for extension of the abatement period in accordance with Section 20.38.100 of the Newport Beach Municipal Code. The property is occupied by a 1,050 square foot office building. No new development or construction is proposed at this time. The applicant wishes to allow the existing nonresidential use to continue for an extended period of time without abatement.

RECOMMENDATION

Staff recommends the Hearing Officer conduct a public hearing, receive testimony from the applicant, the city staff, and members of the public. At the conclusion of the public hearing, it is recommended that the Hearing Officer:

1. Adopt the attached Resolution for the property located at 500 Jasmine Avenue, based on the findings and considerations discussed in this report, approving the Abatement Period Extension to ten years, February 1, 2022 (See Attachment No. 1).



INTRODUCTION

Project Setting

The subject property is located on the southeasterly corner of Jasmine Avenue and Second Avenue in the Corona Del Mar Area of the city. It is bounded by residential uses to the north and east, and commercial office and retail uses to the south and west.

Project Description

The applicant requests an extension of the abatement period of the nonconforming nonresidential use located in the Two-Unit Residential District (R-2). The property is occupied by a single-story, 1,050 square-foot office building which the owner occupies as an architectural business office. The property owner has requested an extension of the abatement period to fifteen years.

Background

Information submitted by the applicant and available in city records indicates the building was constructed in 1946 and was purchased by the present owner in 1969. According to city records, remodel activity and additions were made to the building between 1969 and 1980.

On July 14, 1969, the City Council adopted Ordinance No. 1308 which changed the zoning of the subject property from the Two-Family Residential District (R-2) to the APF District (Administrative, Professional, Financial Commercial) to bring it consistent with Land Use Element of the General Plan.

On July 25, 2006, the Newport Beach City Council adopted Resolution No. 2006-76 approving a comprehensive update to the Newport Beach General Plan ("General Plan Update"), which changed the Land Use Designation of the subject property from APF (Administrative, Professional, Financial Commercial) to RT (Two-Unit Residential).

On January 28, 2008, the City Council adopted Ordinance No. 2008-05, which in addition to other Zoning Code changes, established the maximum time period for the abatement and termination of nonconforming uses in residential districts. However, determinations of nonconformity could not be made until the finalization of the City's Local Coastal Plan (LCP), which occurred on July 14, 2009, and the subsequent Zoning Code Update which was effective November 25, 2010 which delayed the implementation of the abatement provisions.

On October 25, 2010, the City Council adopted a Comprehensive Update to the Zoning Code (Newport Beach Municipal Code Title 20, NBMC) bringing consistency between the Zoning Code and the Land Use Element of the General Plan. The result of that action rendered several properties nonconforming, including the subject property and other existing commercial uses located within residential districts, which in accordance with

Ordinance No. 2008-05 became subject to abatement in accordance with the following Section of Chapter 20.38 of the NBMC:

20.38.100 Abatement Period.

- C. Residential zoning districts involving a structure. In residential zoning districts or in an area where residential uses are allowed in planned community districts or specific plan districts, a nonconforming use of land involving a structure shall be discontinued as follows:
 - 1. Abatement period. A nonconforming use of land involving a structure in a residential zoning district shall be discontinued on the earliest date as follows:
 - a. Within one year; or
 - b. Upon the expiration of the term of a lease on the property. Any lease shall be the last lease entered into for the subject property prior to December 7, 2007; or
 - c. Upon the expiration of a current operating license that is required by State law.

The City sent letters to all known properties with uses that are subject to abatement. The abatement order for the subject properties were issued on January 14, 2011. Staff met with the owner of the subject property and explained the options available to remedy the situation. Those remedies include conversion of use or development to a residential use; request for extension of the abatement period; and/or request to amend the General Plan, and Zoning Code to allow the continuation of the commercial use. In the case of the subject application, the owner chose to pursue an extension of the abatement period to amortize the investment of the current improvements on the subject property.

DISCUSSION

General Plan

The Land Use Element of the General Plan generally guides the future development of the City and would generally allow the continuation of legally established structures and uses; and does not specify requirements for abatement of nonconforming uses. The Zoning Code is the regulatory tool that implements and regulates the provisions of the General Plan.

Zoning Code

To make the subject properties consistent with the Zoning Code would require the abatement of the nonresidential uses. However, the Zoning Code allows for a procedure to grant an extension of the abatement period for the continued use of the existing

building and use. The approval authority for the extension lies with the Hearing Officer in accordance with the provisions of Section 20.38.100C 4b of the NBMC. The Hearing Officer is also required to conduct a public hearing on the request in compliance with Chapter 20.62 of the NBMC.

Findings and Considerations:

In accordance with the provisions of Chapter 20.38 of the NBMC, the Hearing Officer, by resolution, shall approve, conditionally approve, or deny the request for an extension to the abatement period. The resolution shall include: findings of fact; evidence presented of economic hardship arising from the abatement proceedings; the nonconformity's impact on the community; and other factors that may affect the length of the abatement period required to avoid an unconstitutional taking.

In accordance with the provisions of Section 20.38.100 (C-4c), the Hearing Officer in reviewing an application for an extension to the abatement period shall consider the following:

- (1) Length of the abatement period in relation to the owner's investment in the use;
- (2) Length of time the use was operating prior to the date of nonconformity;
- (3) Suitability of the structure for an alternative use;
- (4) Harm to the public if the use remains beyond the abatement period; and
- (5) Cost and feasibility of relocating the use to another site.

The applicant has submitted information in support of the request (Attachment No. 3). Staff has reviewed the information submitted by the applicant and has summarized it below to address the findings and considerations that the Hearing Officer may use in making his determination.

(1) Length of the abatement period in relation to the owner's investment in the use.

According to the property owner, he has occupied the site for his architectural firm since 1969, 43 years. The owner will suffer economic hardship if required to abate since he owns the property and he would have to rent space elsewhere. The owner has requested an abatement period extension of fifteen years, as discussed below.

The one year abatement period specified by the Municipal Code is not of sufficient duration to amortize the property owner's investment, since he owns the building debt free and currently pays no rent. The owner has made improvements and additions to the building since 1969 and has not incurred any that is secured by the property as collateral. The applicant indicates that an extension of 15 years for the abatement of the current use is necessary to avoid an unconstitutional taking of the applicant's property. Staff recommends that a ten year period will provide adequate time for the owner to recover any remaining investment in the property. Ten years is an adequate amount of

time for the owner to evaluate options for his business which may include relocating, selling the property, redeveloping the property consistent with the current zoning requirements or applying to amend the zoning and the General Plan.

(2) Length of time the use was operating prior to the date of nonconformity.

On July 14, 1969, the City Council adopted Ordinance No. 1308 which changed the zoning of the subject property from the R-2 (Two-Unit Residential) District to the APF (Administrative, Professional, Financial Commercial) District to bring it consistent with Land Use Element of the General Plan.

The property became nonconforming with the General Plan in 2006, 6 years ago, when the City Council adopted Resolution No. 2006-76 approving the "General Plan Update". The existing structure and use conformed to the Land Use Element of the General Plan for 37 years prior to the 2006 update; and was not subject to abatement.

(3) Suitability of the structure for an alternative use.

The building could be modified to accommodate other commercial or nonresidential uses. However, the current building is not suitable for conversion from the existing commercial use to a residential building without demolishing and building new, or major renovation to provide adequate living areas and residential parking. In order to convert the building to residential use would require the construction of a new two-car garage utilizing the current curb cut on the side street. Alley access would require demolishing a majority of the building. Any new residential use would have to comply with all current municipal code requirements, including height, floor area and parking.

(4) Harm to the public if the use remains beyond the abatement period.

As seen in the aerial photo on Page 2, the Yeo Property is in an area that is occupied by other nonresidential uses; including office (across the street) and restaurant and retail uses across Jasmine Avenue and on Coast Highway. The office building has been in place for over 43 years and has not posed any negative impact or harm on the neighboring uses. It is anticipated that the continued commercial use of the subject property is compatible with the surrounding uses and will not have any negative impact or pose harm on the neighboring residential and nonresidential uses in the vicinity. Photos of the site as viewed from Jasmine Avenue are attached (Attachment No. 3).

(5) Cost and feasibility of relocating the use to another site.

The applicant's submittal indicates that the relocation of his present architectural office use would be costly since he owns his building free and clear, and there are limited numbers of comparable vacant storefront units or buildings within the vicinity that he would have to rent. Consequently, relocation of the use would result in the additional cost of rent for office space at an off-site location.

RECOMMENDATION

As discussed in Finding and Considerations section above for the property, the applicant has presented information and a request to extend the abatement period to fifteen years. Staff recommends an extension period of ten years for 500 Jasmine Avenue to February 1, 2022 which is consistent with other approved extensions and appropriate in this case.

Staff recommends that the request for the extension for ten years be approved based on the following findings and considerations:

1. Since the owner utilizes the building for conducting his architectural business, the owner would suffer significant economic hardship as a result of the abatement requirement, because he would have to relocate and rent an off-site location.
2. That one year is not an adequate period of time to amortize the property owner's investment in the property, especially since he owns the building debt free and operates his architectural business from this location which is also his primary source of income.
3. That the property became nonconforming in 2006, 6 years ago, when the City Council adopted Resolution No. 2006-76 approving the "General Plan Update". The existing structure and use conformed to the Land Use Element of the General Plan for 43 years prior to the 2006 Update; and was not subject to abatement.
4. That the building could be modified to accommodate other commercial or nonresidential uses. However, the current building is not suitable for conversion from the existing commercial use to a residential building without demolishing and building new, or major renovation to provide adequate living areas and provide the required two-car garage parking.
5. That the property is located in an area that is occupied by other nonresidential uses; including office (across the street) and restaurant and retail uses across Jasmine Avenue and on Coast Highway. The continued commercial use of the subject property is compatible with the surrounding uses and will not have negative impact or pose harm on the neighboring residential and nonresidential uses in the vicinity.
6. That the relocation of the present architectural office use would be costly since the applicant owns the subject building free and clear, and there are limited numbers of comparable vacant storefront units or buildings within the vicinity to relocate his business. Consequently, relocation of the use would result in the additional cost of rent for office space at an off-site location.
7. That the abatement extension of ten years (February 1, 2022) is appropriate in that it will afford the property owner the ability to amortize the value of the building improvements he has made between 1969 and the present. That without the extension of the abatement period, the property owner cannot continue to conduct his occupation and primary source of income, and would suffer additional economic impacts by relocating and leasing an off-site location.

CONCLUSION

Based on the information submitted by the applicant, adequate justification has been presented to extend the period of abatement. Therefore, in accordance with the provisions of Section 20.38.100 of the NBMC, the Hearing Officer may approve the request for extension of the abatement period based on the Findings and Consideration and testimony presented at the hearing. It is recommended that the Hearing Officer take the following action;

- Adopt the attached Resolution for the property located at 500 Jasmine Avenue, based on the findings and considerations discussed in this report, approving the Abatement Period Extension to ten years, February 1, 2022 (See Attachment No. 1).

Environmental Review

The project is categorically exempt under Section 15301, of the California Environmental Quality Act (CEQA) Guidelines - Class 1 (Existing Facilities).

Public Notice

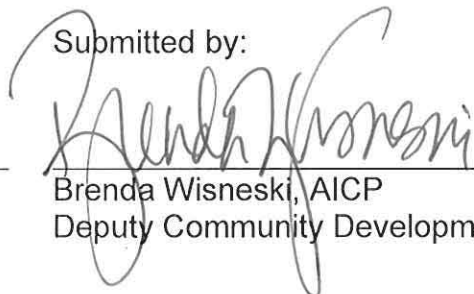
Notice of this hearing was published in the Daily Pilot, mailed to property owners within 300 feet of the property and posted at the site a minimum of 10 days in advance of this hearing consistent with the Municipal Code. Additionally, the item appeared upon the agenda for this meeting which was posted at City Hall and on the City website.

Prepared by:



Javier S. Garcia, AICP
Senior Planner

Submitted by:



Brenda Wisneski, AICP
Deputy Community Development Director

ATTACHMENTS

- PC 1 Draft Resolution Approving the Abatement Extension Request
- PC 2 Applicant's Extension Application and Supporting Information
- PC 3 Site Photos

DRAFT RESOLUTION APPROVING
THE ABATEMENT PERIOD EXTENSION
500 JASMINE AVENUE
(PA2011-012)

ATTACHMENT No. 1

RESOLUTION NO. HO 2012- ____

**A RESOLUTION OF A HEARING OFFICER OF THE CITY
OF NEWPORT BEACH APPROVING THE ABATEMENT
EXTENSION PERIOD FOR THE PROPERTY LOCATED AT
500 JASMINE AVENUE (PA 2011-012)**

WHEREAS, Chapter 20.38.100 of the Newport Beach Municipal Code (NBMC) requires nonconforming nonresidential uses in residential zoning districts to be abated and terminated upon the expiration of time periods identified by the NBMC. Following the issuance of an Abatement Order, Chapter 20.38.100 provides that a property owner may request an extension of the abatement period in order, to amortize a property owner's investment in the property and avoid an unconstitutional taking of property; and

WHEREAS, an application was filed by Ronald W. Yeo, the owner of property located at 500 Jasmine Avenue, and legally described as Lot 2, Block 537, Corona Del Mar Tract, requesting an extension of the abatement period specified by the NBMC Section 20.38.100. If granted, the extension will allow the continued operation of existing commercial use for ten years from the date of the Hearing Officer's approval (February 1, 2022). The property is located in the R-2 Zoning District, where such nonresidential uses are not permitted; and

WHEREAS, a public hearing was held on February 1, 2012, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and purpose of the meeting was given in accordance with the NBMC and other applicable laws. Evidence, both written and oral, was presented and considered at this meeting; and

WHEREAS, the hearing was presided over by Hon. John C. Woolley, retired Judge (California Superior Court, Orange County), Hearing Officer for the City of Newport Beach; and

WHEREAS, the findings and considerations of Section 20.38.100 (C.4(c)) of the NBMC and facts in support of the findings and considerations are as follows:

- 1. The length of the abatement period is not appropriate considering the owner's investment in the use;**

Facts in Support of Finding: The one year abatement period specified by the Municipal Code is not of sufficient duration to amortize the property owner's investment in improvements and additions made to the building. The information submitted by the applicant supports staff recommendation that an extension of 10 years for the abatement of the current uses is necessary to avoid an unconstitutional taking of the applicant's property. Supporting information has not been presented to justify an extension period of more than ten years. Subsequently, the ten year period would allow the owner/tenant additional time to transition out of the building and to pursue other options to continue the use of the building beyond the 10 years recommended. An

extension period of ten years is necessary and adequate to avoid economic hardship that will result if the owner is required to abate his use of the property which is his source of income, and would suffer additional economic impacts by relocating and leasing an off-site location.

- 2. The length of time the use was operating prior to the date of nonconformity justifies the extension of the abatement period beyond the code specified one year.**

Facts in Support of Finding: The property became nonconforming with the General Plan in 2006, 6 years ago, when the City Council adopted Resolution No. 2006-76 approving the “General Plan Update”. The existing structure and use conformed to the Land Use Element of the General Plan for 37 years prior to the 2006 update; and was not subject to abatement.

- 3. The existing structure is not suitable for conversion to an alternate use.**

Facts in Support of Finding: The building could be modified to accommodate other commercial or nonresidential uses. However, the current building is not suitable for conversion from the existing commercial use to a residential building without demolishing and building new, or major renovation to provide adequate living areas and provide the required two-car garage parking.

- 4. No harm to the public will result if the nonresidential use remains beyond the one year abatement period.**

Facts in Support of Finding: The property is located in an area that is occupied by other nonresidential uses; including office (across the street) and retail and restaurant uses across Jasmine Avenue and on Coast Highway. The office building has been in place for over 43 years, and it is anticipated the continued commercial use of the subject property is compatible with the surrounding uses and will not have any negative impact or pose harm on the neighboring residential and nonresidential uses in the vicinity.

- 5. The cost and feasibility of relocating the use to another site cannot be accommodated within the one-year abatement period.**

Facts in Support of Finding: The applicant indicates that the relocation of his present nonresidential use of the building would be costly since there are limited numbers of comparable vacant storefront units or buildings within the vicinity. Additionally, he would have to rent or purchase a new location, whereas he currently owns the subject building and pays no rent.

WHEREAS, this activity has been determined to be categorically exempt under the requirements of the California Environmental Quality Act under Class 1 (Existing

Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment (Section 15061(b)(3) of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby approves the requested Abatement Period Extension (PA2011-012), subject to the findings and considerations set forth above.

Section 2. The Abatement Period Extension for the property located at 500 Jasmine Avenue, and legally described as Lot 2, Block 537, Corona Del Mar Tract, is hereby extended for ten years and will expire on February 1, 2022, at which time all nonresidential use of the property shall cease or the building be demolished, unless an additional extension of the abatement period is granted; or an appropriate change in the Zoning District and the General Plan Land Use Designation are approved and adopted; or a change to the Zoning Regulations pertaining to nonconforming uses or their abatement are approved and adopted prior to that date.

Section 3. This action shall become final and effective fourteen (14) days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20, Planning and Zoning, of the Newport Beach Municipal Code.

APPROVED AND ADOPTED THIS _____ DAY OF _____ 2012.

By: _____
Hon. John C. Woolley, retired Judge
(California Superior Court, Orange County)
Hearing Officer for the City of Newport Beach

ATTEST:

City Clerk

**APPLICANT'S EXTENSION APPLICATION
AND ADDITIONAL INFORMATION**
500 JASMINE AVENUE
(PA2011-012)

ATTACHMENT No. 2



Abatement Period Extension Application

Planning Department

3300 Newport Boulevard, Newport Beach, CA 92663
(949) 644-3200 Telephone | (949) 644-3229 Facsimile
www.newportbeachca.gov

RECEIVED
PLANNING DEPARTMENT
JAN 24 2011

Property Owner/Applicant Name: <u>Ron & Birgitta Yeo</u> Mailing Address: <u>500 Jasmine, Corona del Mar, CA 92625</u> Phone: () <u>(949) 644-8111</u> Fax: () <u>none</u> Email Address: <u>ron@ronyeo.com</u>	Contact (if different) Name: _____ Mailing Address: _____ Phone: () _____ Fax: () _____ Email Address: _____
---	--

Owner's Affidavit

(I) (We) Ron & Birgitta Yeo depose and say that (I am) (we are) the owner(s) of the property (ies) involved in this application. (I) (We) further certify, under penalty of perjury, that the foregoing statements and answers herein contained and the information herewith submitted are in all respects true and correct to the best of (my) (our) knowledge and belief.

Signature(s) _____

Date _____

1/23/2011

1/23/2011

NOTE: An agent may sign for the owner if written authorization from the record owner is filed with the application.

Please answer the questions below. Attach additional sheets, if necessary.

1. Please describe how abatement of the use at this time relates to your investment in the use.

see attached submittal dated stamped 7-11-2011

Our investment is more than financial.

We have been an integral part of the Corona del Mar residential and Commercial Village for over 40 years. Our architectural studio provides us with a unique opportunity to showcase our design principles as well as the ability to walk to work from our residence one block away at 604 Iris.

The current use of the property is critical to our architectural practice.

2. How long has the use been operating?

We have operated our architectural practice continuously in this location for over 40 years. Our property was rezoned from Residential to Office Professional (AP-H) in 1969 by a unanimous vote of the City Council.

3. Please describe the suitability of the structure for an alternative use.

The existing structure could convert to a single family residence, but would not meet some of the zoning codes, such as an enclosed garage. Due to it's small size, this conversion would not be practical. The most logical use would be to demolish and build a large duplex. We are not developers and this is not one of our goals. It would be a shame for the community to loose this studio, the magnificent trees and off street parking.

4. Please describe way there would be no harm to the public if the use remains beyond the abatement period.

See additional attachment date stamped 7-11-2011.

Our current use fits into the Corona del Mar Village context and image far more than a 3 story duplex would. It is far more compatible to the neighbors than most of the parking lots that are on residential zoned properties. It does not have the traffic that is produced by the CdM library, which is in a similar residential area. We receive many compliments on our studio and no complaints from our use. We present no problems to the health, safety and welfare of the neighboring community. We have a unique property and it is safe to say that our studio/office practice is an asset to the community.

5. Please describe the cost and feasibility of relocating the use to another site.

See additional attachment date stamped 7-11-2011

It would be a huge cost, both financially and emotionally for us to relocate. There is no existing similar commercial properties in Corona del Mar that offer a comparable situation for us to rent or purchase.

We own the property free and clear and do not have to pay rent. Renting space somewhere else would be a financial burden to us. It is unlikely that we could locate an owner that is willing to sell us a commercial property in the Village. If one was found, there could be a slight possibility for us to purchase, demolish and rebuild to fit our needs. This would take many years and several million dollars to accomplish, neither of which we have.

-
6. Is there any other evidence relevant to the determination of whether an extension of the abatement period is required to avoid an unconstitutional taking of property?

See additional attachment date stamped 7-11-2011

The termination of our use would amount to forcing us out of business without compensation. We would not be able to complete the current projects that we have.

After our compatible studio use for over 40 years, we could think of nothing worse to happen than this hardship. Denial of an extension would be clearly arbitrary and unreasonable.

Suitable solutions for us would be for the City to:

1. Determine that the existing property use is compatible with the surrounding residential zone and is an "existing legal non-conforming use" due to reclassification and shall be continued in the current use per section 20.62.020 of the municipal code until the owner decides to change it to a residential use.
2. Determine that the current use has no substantial relation to the public health, safety, morals, or general welfare of the neighborhood, and will agree to change the General Plan and zoning as required in order to be consistent at no cost or burden to the owner.

Bottom line:

We have been here forever and don't want to move.

**ADDENDUM TO THE
ABATEMENT PERIOD EXTENSION APPLICATION**

Ron & Birgitta Yeo
Ron Yeo, FAIA Architect inc.
500 Jasmine, Corona del Mar, CA 92625

RECEIVED BY
COMMUNITY

JUL 11 2011

DEVELOPMENT
CITY OF NEWPORT BEACH

This Addendum to the ABATEMENT PERIOD EXTENSION APPLICATION shall be made a part of the Abatement Period Extension Application dated 1/23/2011.

PURPOSE:

This "ADDENDUM" is submitted in order to clarify and expand on the original answers in the 1/23/11 Abatement Period Extension Application.

ITEM 1. *Describe how abatement of the use at this time relates to your investment in the use.*

- A. We purchased the residential property and The City re-zoned it to office/professional use in 1969. (City ordinance # 1308)
- B. We remodeled and made substantial improvements in 1969.
- C. Photographs of the before and after of our office/studio are attached hereto as "Exhibit A" and are made a part hereof.
- D. We own the property free and clear and have used it for our architectural corporation – "Ron Yeo, FAIA Architects, Inc." since 1969.
- E. When the City re-zoned the property to R-2 in 2010, we were led to believe that the current office use would be "grandfathered" and that we would be able to continue our office/studio use as long as we desired.

ITEM 4. *Describe way that there would be no harm to the public if the use remains beyond the abatement period..*

- A. In the 42 years of our continuous use of the property, there has not been an incident, disruption or complaint from the neighbors or the community concerning the operation of our architectural practice. There would be no change in this situation since this use is not a detriment to the health, safety, morals or general welfare of the neighborhood.

ITEM 5. *Describe the cost & feasibility of relocating the use to another site.*

- A. We have reviewed potential options of relocating and have come to the conclusion that the cost and the challenges involved in finding or constructing a suitable facility would be far too much for us to undertake.

ITEM 6. *Other evidence relevant to the determination of whether an extension of the abatement period is required to avoid an unconstitutional taking of property.*

- A. Since the City will not take responsibility for the cost of changing the General Plan and zone change back to office use, we are removing this option (discussed in solution #2.).
- B. We are planning to stay in architectural practice for at least another 15 years.
- C. Our average yearly income from this use over the past 15 years has been \$312,866. If we are not able to continue our practice for the next 15 years, that would amount to \$4,692,996 at the same rate.
- D. Based upon the above information and the potential loss of 4 1/2 million dollars, we respectfully request that the abatement period be extended for an additional fifteen (15) years to November 25, 2026.

By _____

Ron Yeo

7/6/11

EXHIBIT A Abatement period extension application



500 Jasmine - Before (1968)



500 Jasmine - After (1969)



500 Jasmine -Now (2011)

SITE PHOTOS
500 JASMINE AVENUE (PA2011-012)



VIEW FROM INTERSECTION OF JASMINE AVE AND SECOND AVE



VIEW FROM INTERSECTION OF SECOND AVENUE AND ALLEY

ATTACHMENT No. 3

CITY OF NEWPORT BEACH
HEARING OFFICER STAFF REPORT

February 1, 2012 Hearing

Agenda Item 2

SUBJECT: Abatement Period Extension – 3355 Via Lido - (PA2011-153)

APPLICANT: New Port Beach Townhouse LLLP

PLANNER: Javier S. Garcia AICP, Senior Planner
(949) 644-3206, jgarcia@newportbeachca.gov

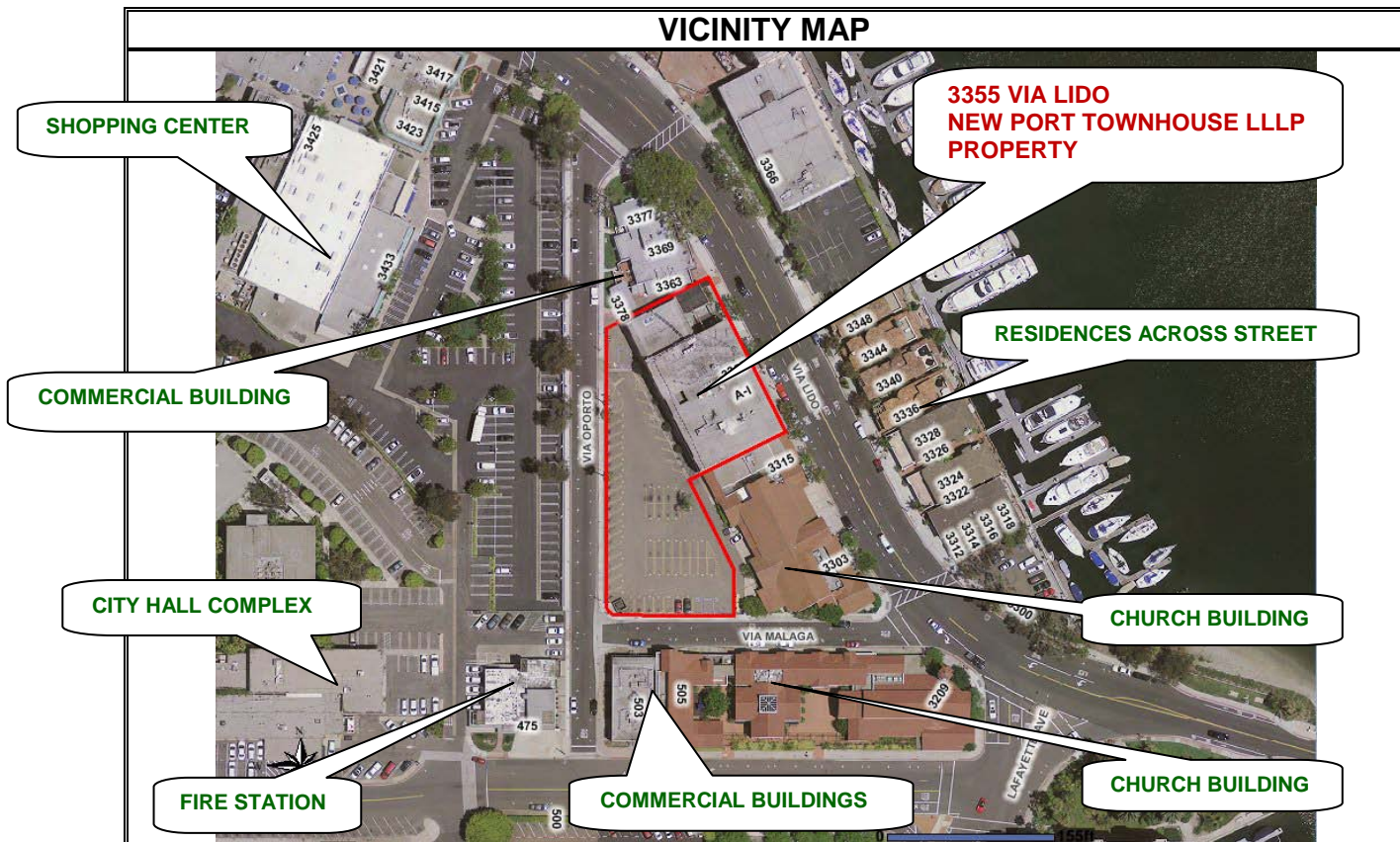
PROJECT SUMMARY

Request for extension of the required Abatement Period specified by Section 20.38.100 of the Newport Beach Municipal Code. The applicant requests to allow the existing nonresidential use of the 31,413 square-foot office building to continue for an extended period of time without abatement. No new development or construction is proposed at this time.

RECOMMENDATION

Staff recommends the Hearing Officer conduct a public hearing, receive testimony from the applicant, the city staff, and members of the public. At the conclusion of the public hearing, it is recommended that the Hearing Officer:

1. Adopt the attached Resolution for the property located at 3355 Via Lido, based on the findings and considerations discussed in this report, approving the Abatement Period Extension to ten years, February 1, 2022 (See Attachment No. 1).



**GENERAL PLAN and
COASTAL LAND USE**

ZONING

**3355 VIA LIDO
NEW PORT TOWNHOUSE LLLP PROPERTY**



**3355 VIA LIDO
NEW PORT TOWNHOUSE LLLP PROPERTY**



LOCATION	GENERAL PLAN/ COASTAL PLAN	ZONING	CURRENT USE
ON-SITE	RM (20DU/AC)/RM-D Multi-Unit Residential	RM (2178) Multi-Unit Residential	Office, Retail and Restaurant
North and West	RM (20DU/AC)/RM-D Multi-Unit Residential	PI 0.75 (Private Institution)	Retail and Office
South	PI (Private Institution)/ PI- B (Private Institution)	PI 0.75 (Private Institution)	First Church of Christ, Science and St Michael's Church Anglican
East	RM (20DU/AC)/RM-D Multi-Unit Residential	RM (2178) Multi-Unit Residential	Offices and Residential

INTRODUCTION

Project Setting

The subject office building is located on the westerly side of Via Lido in the Lido Village Area of the city. It is bounded by commercial and residential uses to the north, west and east, and church uses to the south.

Project Description

A request for extension of the required abatement period specified by Section 20.38.100 of the Newport Beach Municipal Code. The 31,413 square-foot office building is located within the Multi-Unit Residential Zoning District (RM 2178). The building is occupied by several tenants which include California Beach Sushi (since 1984), an attorney's office (since 2002), hair salon (since 1996), and telecom facilities and equipment (leases and options that extend to 2016). The owner intends to construct a residential project on the subject property. The existing tenants are currently on month-to-month lease terms or subject to 30 day notice to vacate (telecom facilities occupants). The property owner is currently in the conceptual design phase for the project, but no application has been submitted to the City.

The permit entitlement process with the City and the Coastal Commission could take 18 to 24 months, or more. Although, it is anticipated that demolition and construction could begin as soon as 2014 with approximately a year for completion. Such a timeline is not a certainty and can be influenced by a number of unforeseeable factors which may include economic and financial fluctuations, and entitlement processing through the City and the Coastal Commission. Therefore, in the meantime, in order to maintain rental income and leases, the applicant requests an extension of the abatement period. Staff recommends a period of ten years is appropriate in this case to accommodate unforeseeable circumstances that may delay redevelopment of the property.

Background

Information submitted by the applicant and available in city records indicates the subject building was constructed in 1957 and was purchased by the present owner in October 2011, as well as the property at 3388 Via Lido.

On July 25, 2006, the Newport Beach City Council adopted Resolution No. 2006-76 approving a comprehensive update to the Newport Beach General Plan ("General Plan Update"), which changed the Land Use Designation of the subject property from RSC (Retail and Service Commercial) to RM 2178 (Multi-Unit Residential).

On January 28, 2008, the City Council adopted Ordinance No. 2008-05, which in addition to other Zoning Code changes, established the maximum time period for the abatement and termination of nonconforming uses in residential districts. However, determinations of

nonconformity could not be made until the finalization of the City's Local Coastal Plan (LCP), which occurred on July 14, 2009, and the subsequent Zoning Code Update which was effective November 25, 2010 which delayed the implementation of the abatement provisions.

On October 25, 2010, the City Council adopted a Comprehensive Update to the Zoning Code (Newport Beach Municipal Code Title 20, NBMC) bringing consistency between the Zoning Code and the Land Use Element of the General Plan. The result of that action rendered several properties nonconforming, including the subject property and other existing commercial uses located within residential districts, which in accordance with Ordinance No. 2008-05 became subject to abatement in accordance with the following Section of Chapter 20.38 of the NBMC:

20.38.100 Abatement Period.

- C. Residential zoning districts involving a structure. In residential zoning districts or in an area where residential uses are allowed in planned community districts or specific plan districts, a nonconforming use of land involving a structure shall be discontinued as follows:
 - 1. Abatement period. A nonconforming use of land involving a structure in a residential zoning district shall be discontinued on the earliest date as follows:
 - a. Within one year; or
 - b. Upon the expiration of the term of a lease on the property. Any lease shall be the last lease entered into for the subject property prior to December 7, 2007; or
 - c. Upon the expiration of a current operating license that is required by State law.

The City sent letters to all known properties with uses that are subject to abatement. The abatement order for the subject property was issued on January 14, 2011. Staff met with the owner of the subject property and explained the options available to remedy the situation. Those remedies include conversion of use or development to a residential use; request for extension of the abatement period; and/or request to amend the General Plan, and Zoning Code to allow the continuation of the commercial use. In the case of the subject property, the entitlement process for permits to construct the residential project could take up to 24 months or more. Therefore, the applicant requests an extension of the abatement period.

DISCUSSION

General Plan

The Land Use Element of the General Plan generally guides the future development of the City and would generally allow the continuation of legally established structures and

uses; and does not specify requirements for abatement of nonconforming uses. The Zoning Code is the regulatory tool that implements and regulates the provisions of the General Plan.

Zoning Code

To make the subject properties consistent with the Zoning Code would require the abatement of the nonresidential uses. However, the Zoning Code allows for a procedure to grant an extension of the abatement period for the continued use of the existing building and use. The approval authority for the extension lies with the Hearing Officer in accordance with the provisions of Section 20.38.100C 4b of the NBMC. The Hearing Officer is also required to conduct a public hearing on the request in compliance with Chapter 20.62 of the NBMC.

Findings and Considerations:

In accordance with the provisions of Chapter 20.38 of the NBMC, the Hearing Officer, by resolution, shall approve, conditionally approve, or deny the request for an extension to the abatement period. The resolution shall include: findings of fact; evidence presented of economic hardship arising from the abatement proceedings; the nonconformity's impact on the community; and other factors that may affect the length of the abatement period required to avoid an unconstitutional taking.

In accordance with the provisions of Section 20.38.100 (C-4c), the Hearing Officer in reviewing an application for an extension to the abatement period shall consider the following:

- (1) Length of the abatement period in relation to the owner's investment in the use;
- (2) Length of time the use was operating prior to the date of nonconformity;
- (3) Suitability of the structure for an alternative use;
- (4) Harm to the public if the use remains beyond the abatement period; and
- (5) Cost and feasibility of relocating the use to another site.

The applicant has submitted information in support of the request (Attachment No. 3). Staff has reviewed the information submitted by the applicant and has summarized it below to address the findings and considerations for the property involved, that the Hearing Officer may use in making his determination.

(1) Length of the abatement period in relation to the owner's investment in the use.

According to the property owner's representative, the property was purchased in October 2011 and the owner was recently made aware of the abatement requirements. The owner will suffer economic hardship if required to abate the nonresidential uses since they are not prepared at this time to move forward with the residential project.

Because of the recent acquisition of the property, architectural design changes and economic circumstances the residential project has been delayed.

The one year abatement period specified by the Municipal Code is not of sufficient duration for the property owner to develop construction plans and obtain the necessary entitlements from the City and the Coastal Commission. Additionally, if the nonresidential uses are required to abate the owner would suffer a substantial loss of rental income. Staff recommends that a ten year period would provide the owner additional time to process the proposed residential project, and is consistent with the period of extension approved in similar applications.

(2) Length of time the use was operating prior to the date of nonconformity.

The property became nonconforming with the General Plan in 2006, 6 years ago, when the City Council adopted Resolution No. 2006-76 approving the “General Plan Update”. The existing structure and use conformed to the Land Use Element of the General Plan for the prior 49 years; and the existing nonresidential uses were not subject to abatement until 2010.

(3) Suitability of the structure for an alternative use.

The building could be modified to accommodate other commercial or nonresidential uses. However, the age and configuration of the current building is not suitable for conversion from the existing commercial use to a residential building without demolishing and building new, or major renovation to provide adequate living areas and residential parking. Additionally, the property owner’s proposed residential project will comply with all current municipal requirements and the Lido Village Design Guidelines, including height, floor area and parking. As stated previously, the building permit entitlement process with the city and coastal commission will take approximately 18 to 24 months.

(4) Harm to the public if the use remains beyond the abatement period.

As seen in the aerial photo on Page 2, the property is located in an area that is occupied by other nonresidential uses and churches; including office (across the street), and restaurant and retail uses across Via Oporto and Via Malaga. It is anticipated that the continued commercial use of the subject property is compatible with the surrounding uses and will not have negative impact or pose harm on the neighboring residential and nonresidential uses in the vicinity. It is also anticipated that until the proposed residential project constructed, the existing commercial building will be compatible with the future City Hall and Lido Village Revitalization Plan. Photos of the site as viewed from Via Lido and Via Oporto are attached (Attachment No. 3).

(5) Cost and feasibility of relocating the use to another site.

The applicant's submittal indicates that the relocation of the existing uses would be costly since there are limited numbers of comparable available storefront units or buildings in the vicinity that could accommodate the 31,413 square feet of commercial tenant space that comprises the subject property. Consequently, the relocation of the existing uses would result in the additional costs to existing tenants that would be required to enter into new and potentially less favorable leases or lease terms.

RECOMMENDATION

As discussed in Finding and Considerations section above for the property, the applicant has presented information and a request to extend the abatement period to ten years. Staff recommends an extension period of ten years for 3355 Via Lido to February 1, 2022 is appropriate in this case and consistent with similar requests.

That the request for the extension for ten years be approved based on the following findings and considerations:

1. That one year is not an adequate period of time to amortize the property owner's investment in the property, since it was recently purchased in October 2011. The owner would suffer significant economic hardship as a result of the abatement requirement, due to the loss of rental income during the time it would take to obtain permit entitlement to begin construction of the residential project.
2. That the property became nonconforming in 2006, 6 years ago, when the City Council adopted Resolution No. 2006-76 approving the "General Plan Update". The existing structure and use conformed to the Land Use Element of the General Plan for 49 years prior to the 2006 Update; and was not subject to abatement until 2010.
3. That the building could be modified to accommodate other commercial or nonresidential uses. However, the current age and configuration of the building is not suitable for conversion from the existing commercial use to a residential building without demolishing and building new, or major renovation to provide adequate living areas and residential parking.
4. That the property is located in an area that is occupied by other nonresidential uses and churches; including office (across the street), and restaurant and retail uses across Via Oporto and Via Malaga. It is anticipated that the continued commercial use of the subject property is compatible with the surrounding uses and will not have negative impact or pose harm on the neighboring residential and nonresidential uses in the vicinity.
5. That the relocation of the existing uses would be costly since there are limited numbers of comparable vacant storefront units or buildings available in the vicinity to accommodate the 31,413 square feet of on-site tenant space. Consequently, relocation of the existing uses would result in the additional costs to existing tenants that would be required to enter into new and potentially less favorable leases or lease terms.
6. That the abatement extension of ten years (February 1, 2022) is appropriate in this case since it will afford the property owner the ability to amortize the value of

the building improvements; and maintain rental income during the time required to obtain building permit entitlement through the city and the coastal commission for the construction of the new residential project.

CONCLUSION

Based on the information submitted by the applicant, adequate justification has been presented to extend the period of abatement. Therefore, in accordance with the provisions of Section 20.38.100 of the NBMC, the Hearing Officer may approve the request for extension of the abatement period based on the Findings and Consideration and testimony presented at the hearing. It is recommended that the Hearing Officer take the following action;

- Adopt the attached Resolution for the property located at 3355 Via Lido, based on the findings and considerations discussed in this report, approving the Abatement Period Extension to ten years, February 1, 2022 (See Attachment No. 1).

Environmental Review

The project is categorically exempt under Section 15301, of the California Environmental Quality Act (CEQA) Guidelines - Class 1 (Existing Facilities).

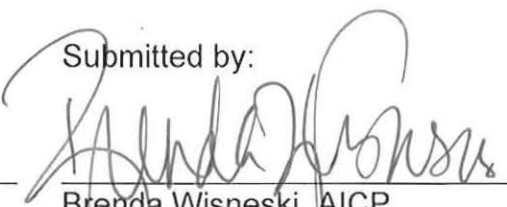
Public Notice

Notice of this hearing was published in the Daily Pilot, mailed to property owners within 300 feet of the property and posted at the site a minimum of 10 days in advance of this hearing consistent with the Municipal Code. Additionally, the item appeared upon the agenda for this meeting which was posted at City Hall and on the City website.

Prepared by:


Javier S. Garcia, AICP
Senior Planner

Submitted by:


Brenda Wisneski, AICP
Deputy Community Development Director

ATTACHMENTS

- PC 1 Draft Resolution Approving the Abatement Extension Request
- PC 2 Applicant's Extension Application and Supporting Information
- PC 3 Site Photos

DRAFT RESOLUTION APPROVING
THE ABATEMENT PERIOD EXTENSION
3355 VIA LIDO
(PA2011-153)

ATTACHMENT No. 1

RESOLUTION NO. HO 2012- ____

**A RESOLUTION OF A HEARING OFFICER OF THE CITY
OF NEWPORT BEACH APPROVING THE ABATEMENT
EXTENSION PERIOD FOR THE PROPERTY LOCATED AT
3355 VIA LIDO (PA 2011-153)**

WHEREAS, Chapter 20.38.100 of the Newport Beach Municipal Code (NBMC) requires nonconforming nonresidential uses in residential zoning districts to be abated and terminated upon the expiration of time periods identified by the NBMC. Following the issuance of an Abatement Order, Chapter 20.38.100 provides that a property owner may request an extension of the abatement period in order, to amortize a property owner's investment in the property and avoid an unconstitutional taking of property; and

WHEREAS, an application was filed by New Port Townhouse LLLP, the owner of property located at 3355 Via Lido, and legally described as Portion of Lot 4, Lot 5, and Portion of abandoned alley of Tract 1117, requesting an extension of the abatement period specified by the NBMC Section 20.38.100. If granted, the extension will allow the continued operation of existing commercial use for ten years from the date of the Hearing Officer's approval (February 1, 2022). The property is located in the RM (2178) Zoning District, where such nonresidential uses are not permitted; and

WHEREAS, a public hearing was held on February 1, 2012, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and purpose of the meeting was given in accordance with the NBMC and other applicable laws. Evidence, both written and oral, was presented and considered at this meeting; and

WHEREAS, the hearing was presided over by Hon. John C. Woolley, retired Judge (California Superior Court, Orange County), Hearing Officer for the City of Newport Beach; and

WHEREAS, the findings and considerations of Section 20.38.100 (C.4(c)) of the NBMC and facts in support of the findings and considerations are as follows:

- 1. The length of the abatement period is not appropriate considering the owner's investment in the use;**

Facts in Support of Finding: The one year abatement period specified by the Municipal Code is not of sufficient duration to amortize the property owner's investment, since the current owner recently purchased the property and was recently made aware of the abatement requirements. The information submitted by the applicant supports that a 10 year abatement period is necessary to avoid an unconstitutional taking of the applicant's property. The ten year period would allow the owner to recover any remaining investment in the property to avoid an unconstitutional taking, will allow additional time

to process the proposed residential project, and maintain rental income during the time required to obtain building permits. The 10 year extension period is also consistent with the period of extension approved in similar applications.

2. The length of time the use was operating prior to the date of nonconformity justifies the extension of the abatement period beyond the code specified one year.

Facts in Support of Finding: The property became nonconforming with the General Plan in 2006, 6 years ago, when the City Council adopted Resolution No. 2006-76 approving the “General Plan Update”. The existing structure and use conformed to the Land Use Element of the General Plan for 49 years prior to the 2006 Update; and was not subject to abatement until 2010.

3. The existing structure is not suitable for conversion to an alternate use.

Facts in Support of Finding: The building could be modified to accommodate other commercial or nonresidential uses. However, the current building is not suitable for conversion from the existing commercial use to a residential building without demolishing and building new, or major renovation to provide adequate living areas and residential parking.

4. No harm to the public will result if the nonresidential uses remain beyond the one year abatement period.

Facts in Support of Finding: The property is located in an area that is occupied by other nonresidential uses and churches; including office (across the street), and restaurant and retail uses across Via Oporto and Via Malaga. Continued commercial use of the subject property is compatible with the surrounding uses and will not have any negative impact or pose harm on the neighboring residential and nonresidential uses in the vicinity.

5. The cost and feasibility of relocating the uses to another site cannot be accommodated within the one-year abatement period.

Facts in Support of Finding: The applicant’s submittal indicates that the relocation of the existing uses would be costly since there are limited numbers of comparable vacant storefront units or buildings available in the vicinity to accommodate the 31,413 square feet of on-site tenant space. Consequently, relocation of the existing uses would result in the additional costs to existing tenants that would be required to enter into new and potentially less favorable leases or lease terms.

WHEREAS, this activity has been determined to be categorically exempt under the requirements of the California Environmental Quality Act under Class 1 (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment (Section 15061(b)(3) of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby approves the requested Abatement Period Extension (PA2011-153), subject to the findings and considerations set forth above.

Section 2. The Abatement Period Extension for the property located at 3355 Via Lido, and legally described as Portion of Lot 4, Lot 5, and Portion of abandoned alley of Tract 1117, is hereby extended for ten years and will expire on February 1, 2022, at which time all nonresidential use of the property shall cease or the building be demolished, unless an additional extension of the abatement period is granted; or an appropriate change in the Zoning District and the General Plan Land Use Designation are approved and adopted; or a change to the Zoning Regulations pertaining to nonconforming uses or their abatement are approved and adopted prior to that date.

Section 3. This action shall become final and effective fourteen (14) days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20, Planning and Zoning, of the Newport Beach Municipal Code.

APPROVED AND ADOPTED THIS _____ DAY OF _____ 2012.

By: _____
Hon. John C. Woolley, retired Judge
(California Superior Court, Orange County)
Hearing Officer for the City of Newport Beach

ATTEST:

City Clerk

**APPLICANT'S EXTENSION APPLICATION
AND ADDITIONAL INFORMATION**

3355 VIA LIDO
(PA2011-153)

ATTACHMENT No. 2



Abatement Period Extension Application


Community Development Department Planning Division

3300 Newport Boulevard, Newport Beach, CA 92663
(949) 644-3200 Telephone | (949) 644-3229 Facsimile
www.newportbeachca.gov

Property Owner/Applicant Name: New Port Beach Townhouse LLLP Mailing Address: 500 Hogsback Road Mason, MI 48854 Phone: () _____ Fax: () _____ Email Address: _____	Contact (if different) Name: Steve Mills Mailing Address: 3120 Sovereign Drive, Suite 4B Lansing, MI 48911 Phone: (517) 525-4900 Fax: (517) 244-3601 Email Address: smills@dartdevelopment.com
---	---

Owner's Affidavit

(I) (We) New Port Beach Townhouse LLLP depose and say that (I am) (we are) the owner(s) of the property (ies) involved in this application. (I) (We) further certify, under penalty of perjury, that the foregoing statements and answers herein contained and the information herewith submitted are in all respects true and correct to the best of (my) (our) knowledge and belief.

Signature(s)  Date 1-12-12

NOTE: An agent may sign for the owner if written authorization from the record owner is filed with the application.

Please answer the questions below. Attach additional sheets, if necessary.

Site Address: 3355 Via Lido, Newport Beach, CA 92663

1. Please describe how abatement of the use at this time relates to your investment in the use and the abatement period requested.





Abatement Period Extension Application

Community Development Department

Planning Division

3300 Newport Boulevard, Newport Beach, CA 92663

(949) 644-3200 Telephone | (949) 644-3229 Facsimile

www.newportbeachca.gov

Property Owner/Applicant	Contact (if different)
Name: <u>BAYFRONT HOLDINGS, LP</u>	Name: <u>MATT MONTGOMERY</u>
Mailing Address: _____	Mailing Address: <u>7040 SCHOLARSHIP</u>
_____	<u>IRVINE, CA 92612</u>
Phone: () _____	Phone: (949) <u>838-0011</u>
Fax: () _____	Fax: () _____
Email Address: _____	Email Address: <u>MM@MARSHALLLLC.COM</u>

Owner's Affidavit

(I) (We) BAYFRONT HOLDINGS, LP depose and say that (I am) (we are) the owner(s) of the property (ies) involved in this application. (I) (We) further certify, under penalty of perjury, that the foregoing statements and answers herein contained and the information herewith submitted are in all respects true and correct to the best of (my) (our) knowledge and belief.

Signature(s) _____

Date 8-4-11

NOTE: An agent may sign for the owner if written authorization from the record owner is filed with the application.

Please answer the questions below. Attach additional sheets, if necessary.

Site Address: 3355 VIALIDO, NEWPORT BEACH, CA 92663

1. Please describe how abatement of the use at this time relates to your investment in the use and the abatement period requested.

IT IS THE INTENTIONS OF THE OWNER TO RE-DEVELOP
THE SUBJECT PROPERTY AS A RESIDENTIAL USE, HOWEVER,
AT THIS TIME THE PROJECT IS NOT ENTITLED. WE ANTICIPATE
TO BEGIN THE ENTITLEMENT PROCESS IN THE NEAR FUTURE.
IN THE MEANTIME IS IS ESSENTIAL TO HAVE THE
CURRENT USE REMAIN AS WE HAVE IMPORTANT TENANT
USES THAT CATER TO THE SURROUNDING AREA AS WELL
AS PROVIDE A SUPPLEMENTAL CASHFLOW FOR THE OWNER.

2. How long has the use been operating?

THE CURRENT COMMERCIAL USE HAS BEEN IN PLACE SINCE THE STRUCTURE WAS CONSTRUCTED IN THE EARLY 1960'S. MANY EXISTING TENANTS HAVE BEEN THERE FOR OVER 20 YEARS.

3. Please describe the suitability of the structure for an alternative use.

DUE TO THE CURRENT CONFIGURATION OF THE BUILDING THE CURRENT COMMERCIAL USE WOULD BE THE ONLY SUITABLE USE FOR THE PROPERTY. IN ORDER TO ACHIEVE ANY OTHER USE THE ENTIRE PROPERTY WOULD NEED TO BE REDEVELOPED IN ITS ENTIRETY.

4. Please describe way there would be no harm to the public if the use remains beyond the abatement period.

THE CURRENT TENANTS CONSIST OF A RESTAURANT, A BARBER, LAWYER, THERAPIST, AS WELL AS HOST TWO (2) CELLULAR COMPANIES ANTENNAS. THESE "CELL SITES" ARE IN AN IMPERATIVE LOCATION TO PROVIDE VERIZON AND SPRINT CUSTOMERS WITH CELLULAR SERVICE IN THE NEWPORT AREA. THERE IS NO NEGATIVE IMPACT ON THE PUBLIC.

5. Please describe the cost and feasibility of relocating the use to another site.

RELOCATING ALL TENANTS IS NOT POSSIBLE AT THIS POINT.

6. Is there any other evidence relevant to the determination of whether an extension of the abatement period is required to avoid an unconstitutional taking of property?

OUR INTENTIONS ARE TO CONFORM WITH THE NEW RESIDENTIAL ZONING OF THE SUBJECT PROPERTY. WE HAVE ALREADY BEGUN THE DESIGN PROCESS BUT ARE STILL CONSTRAINED BY LACK OF ENTITLEMENTS. BY EXTENDING THE ABATEMENT PERIOD IT WILL PROVIDE THE LEAST DISTURBANCE TO THE SURROUNDING AREA AS WE PROCEED WITH OUR DUE DILIGENCE/ENTITLEMENT PHASE.

SITE PHOTOS
3355 VIA LIDO (PA2011-153)



VIEW FROM VIA LIDO



VIEW FROM VIA OPORTO, AT THE REAR OF THE PROPERTY

ATTACHMENT No. 3

CITY OF NEWPORT BEACH
HEARING OFFICER STAFF REPORT

February 1, 2012 Hearing

Agenda Item 3

SUBJECT: Abatement Period Extension – 1499 Monrovia Avenue - (PA2011-152)

APPLICANT: Kenneth M. Kaplan, Property Owner

PLANNER: Javier S. Garcia AICP, Senior Planner
(949) 644-3206, jgarcia@newportbeachca.gov

PROJECT SUMMARY

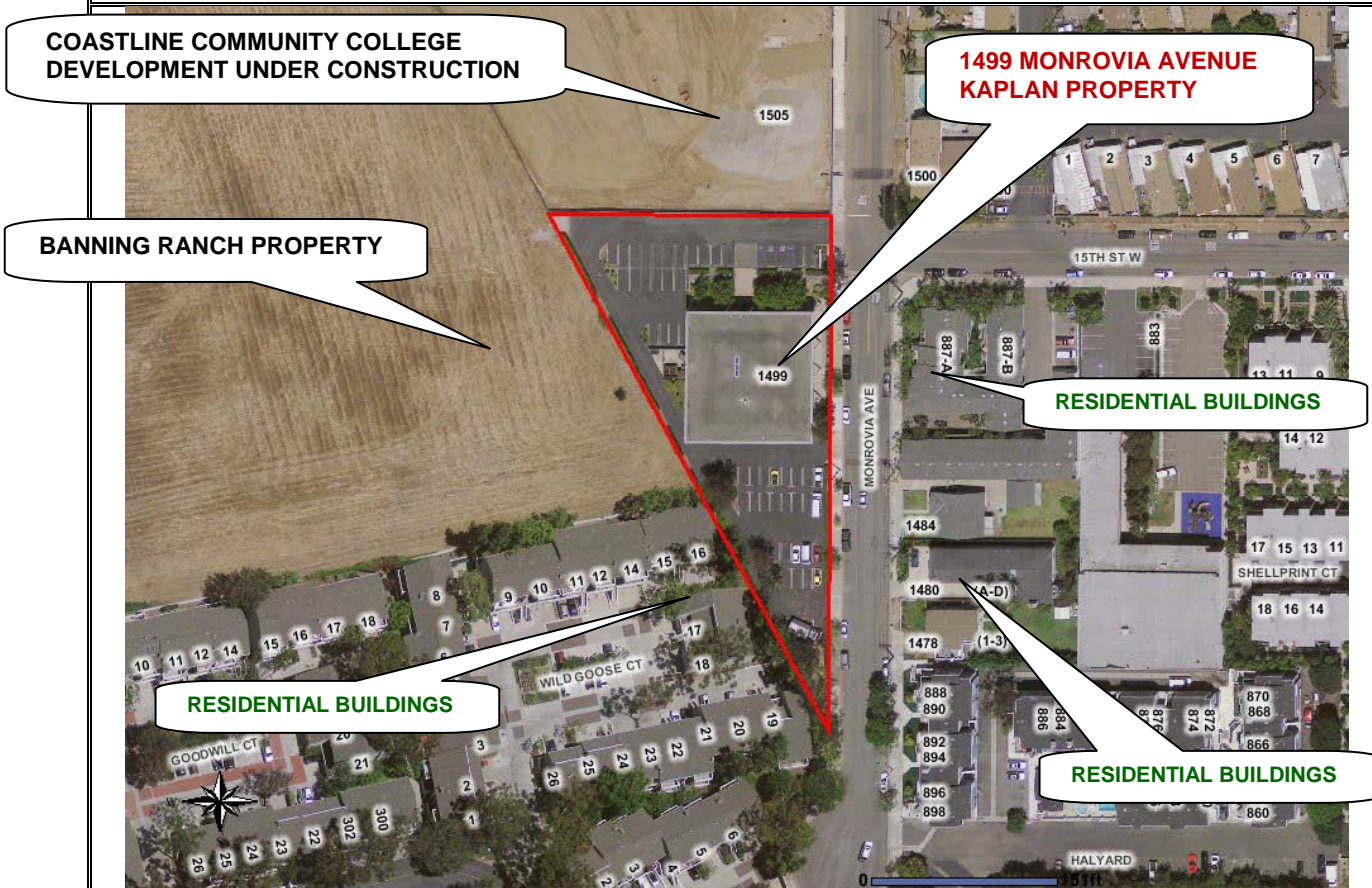
Request for extension of the required Abatement Period specified by Section 20.38.100 of the Newport Beach Municipal Code. The applicant requests to allow the existing nonresidential use of the 17,000 square-foot office building to continue for an extended period of time without abatement. No new development or construction is associated with this application.

RECOMMENDATION

Staff recommends the Hearing Officer conduct a public hearing, receive testimony from the applicant, the city staff, and members of the public. At the conclusion of the public hearing, it is recommended that the Hearing Officer:

1. Adopt the attached Resolution for the property located at 1499 Monrovia Avenue, based on the findings and considerations discussed in this report, approving the Abatement Period Extension to ten years, February 1, 2022 (See Attachment No. 1).

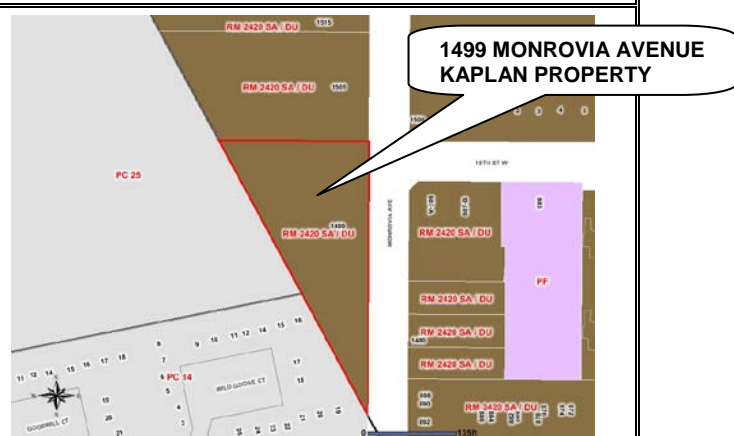
VICINITY MAP



GENERAL PLAN



ZONING



LOCATION	GENERAL PLAN	ZONING	CURRENT USE
ON-SITE	RM (18DU/AC) Multiple Unit Residential	RM (2420) Multi-Unit Residential	Commercial Office Building
North	RM (18DU/AC) Multiple Unit Residential	RM (2420) Multi-Unit Residential	Community College Project
West	RM (18DU/AC) Multiple Unit Residential	RM (2420) Multi-Unit Residential	Banning Ranch Project
South and East	RM (18DU/AC) Multiple Unit Residential	RM (2420) Multi-Unit Residential	Residential and Mobile Home Park

INTRODUCTION

Project Setting

The subject office building is located on the west side of Monrovia Avenue in the West Newport Mesa Area of the city. It is bounded by the Coastline Community College District Project (currently under construction) to the north and the proposed Banning Ranch Project to the west; and residential uses and a mobile home park to the east and south.

Project Description

A request for extension of the required abatement period specified by Section 20.38.100 of the Newport Beach Municipal Code. The two-story, 17,000 square-foot office building is located within the Multi-Unit Residential Zoning District (RM 2420). According to the applicant, the building was constructed for and has been occupied by publishers of Road and Track magazine and more recently by Hatchette Magazines Inc, which publishes Road & Track, Cycle World and Car and Driver magazines, since 1998. The applicant requests an extension of the abatement period to allow the existing nonresidential use to continue.

Background

Information submitted by the applicant and available in city records indicates the building was constructed in 1957 and was purchased by the present owner in December 2007.

On July 25, 2006, the Newport Beach City Council adopted Resolution No. 2006-76 approving a comprehensive update to the Newport Beach General Plan ("General Plan Update"), which changed the Land Use Designation of the subject property from M-1-A (Light Industrial) to RM (Multi-Unit Residential, 18DU/AC).

On January 28, 2008, the City Council adopted Ordinance No. 2008-05, which in addition to other Zoning Code changes, established the maximum time period for the abatement and termination of nonconforming uses in residential districts. However, determinations of nonconformity could not be made until the finalization of the City's Local Coastal Plan (LCP), which occurred on July 14, 2009, and the subsequent Zoning Code Update which was effective November 25, 2010 which delayed the implementation of the abatement provisions.

On October 25, 2010, the City Council adopted a Comprehensive Update to the Zoning Code (Newport Beach Municipal Code Title 20, NBMC) bringing consistency between the Zoning Code and the Land Use Element of the General Plan. The result of that action rendered several properties nonconforming, including the subject property and other

existing commercial uses located within residential districts, which in accordance with Ordinance No. 2008-05 became subject to abatement in accordance with the following Section of Chapter 20.38 of the NBMC:

20.38.100 Abatement Period.

- C. Residential zoning districts involving a structure. In residential zoning districts or in an area where residential uses are allowed in planned community districts or specific plan districts, a nonconforming use of land involving a structure shall be discontinued as follows:
 - 1. Abatement period. A nonconforming use of land involving a structure in a residential zoning district shall be discontinued on the earliest date as follows:
 - a. Within one year; or
 - b. Upon the expiration of the term of a lease on the property. Any lease shall be the last lease entered into for the subject property prior to December 7, 2007; or
 - c. Upon the expiration of a current operating license that is required by State law.

The City sent letters to all known properties with uses that are subject to abatement. The abatement order for the subject properties were issued on January 14, 2011. Staff contacted the owner of the subject property and explained the options available to remedy the situation. Those remedies include conversion of use or development to a residential use; request for extension of the abatement period; and/or request to amend the General Plan, and Zoning Code to allow the continuation of the commercial use. In the case of the subject application, the owner chose to pursue an extension of the abatement period. If the extension is granted, the owner may pursue any of the remedies mentioned above at a future date. The extension will also provide the owner additional time to amortize the investment of the current improvements on the property, as well as negotiate leases, in order to maintain the rental income.

The applicant has filed a claim that alleges down zoning of the subject property which occurred as a result of the 2006 General Plan Update. The amendment changed the Land Use Designation of the subject property from M-1-A (Light Industrial) to RM (Multi-Unit Residential, 18DU/AC). The City intends to defend itself against this lawsuit.

DISCUSSION

General Plan

The Land Use Element of the General Plan generally guides the future development of the City and would generally allow the continuation of legally established structures and uses; and does not specify requirements for abatement of nonconforming uses. The

Zoning Code is the regulatory tool that implements and regulates the provisions of the General Plan.

Zoning Code

To make the subject properties consistent with the Zoning Code would require the abatement of the nonresidential uses. However, the Zoning Code allows for a procedure to grant an extension of the abatement period for the continued use of the existing building and use. The approval authority for the extension lies with the Hearing Officer in accordance with the provisions of Section 20.38.100C 4b of the NBMC. The Hearing Officer is also required to conduct a public hearing on the request in compliance with Chapter 20.62 of the NBMC.

Findings and Considerations:

In accordance with the provisions of Chapter 20.38 of the NBMC, the Hearing Officer, by resolution, shall approve, conditionally approve, or deny the request for an extension to the abatement period. The resolution shall include: findings of fact; evidence presented of economic hardship arising from the abatement proceedings; the nonconformity's impact on the community; and other factors that may affect the length of the abatement period required to avoid an unconstitutional taking.

In accordance with the provisions of Section 20.38.100 (C-4c), the Hearing Officer in reviewing an application for an extension to the abatement period shall consider the following:

- (1) Length of the abatement period in relation to the owner's investment in the use;
- (2) Length of time the use was operating prior to the date of nonconformity;
- (3) Suitability of the structure for an alternative use;
- (4) Harm to the public if the use remains beyond the abatement period; and
- (5) Cost and feasibility of relocating the use to another site.

The applicant has submitted the attached letter in conjunction with the application for extension of the abatement period (Attachment No. 2). Staff has reviewed the information submitted by the applicant and, where applicable, has summarized it below to address the findings and considerations for the property involved, that the Hearing Officer may use in making his determination.

- (1) Length of the abatement period in relation to the owner's investment in the use.**

According to the property owner, he has owned the property since December 2007. Per the owner, the current tenant has occupied the building since he purchased the property and city records indicate the tenant occupied the building since 1998. Although the

owner has not specified a particular duration for the extension, staff recommends that the one year abatement period specified by the Municipal Code is not sufficient duration to amortize the property owner's investment in the building and other on site improvements (parking lot and landscape improvements), the ability to negotiate leases (which will expire in September 2012), or to renegotiate the financing of the property (which will come due in the next year). Based on the information submitted by the applicant, staff recommends that an extension of 10 years for the abatement of the current uses is necessary to avoid an unconstitutional taking of the applicant's property; and to avoid the economic hardship that will result by the abatement of the nonresidential use which provides a stable revenue stream. The ten year extension period is also consistent with the period of extension approved in other applications.

(2) Length of time the use was operating prior to the date of nonconformity.

The property became nonconforming with the General Plan in 2006, 6 years ago, when the City Council adopted Resolution No. 2006-76 approving the "General Plan Update". The existing structure and use conformed to the Land Use Element of the General Plan for 49 years prior to the 2006 update; and was not subject to abatement until 2008.

(3) Suitability of the structure for an alternative use.

The building could be modified to accommodate other commercial or nonresidential uses. The existing building is occupied by an editorial and publishing business, and constructed to commercial building code requirements that are not suitable for conversion to a residential building or use. Such conversion would likely require demolishing and building new; or major renovation with significant structural and seismic alterations to provide adequate living areas and residential parking, which includes garage parking.

(4) Harm to the public if the use remains beyond the abatement period.

As seen in the aerial photo on Page 2, the property is in an area that is occupied by other nonresidential uses and public institutions; including the Coastline Community College Project, Banning Ranch Project; and residential and mobile home park uses (across Monrovia Avenue). It is anticipated that the continued commercial use of the subject property is compatible with the surrounding uses and will not have any negative impact or pose harm on the neighboring residential and nonresidential uses in the vicinity. Photos of the site as viewed from Monrovia Avenue are attached (Attachment No. 3).

(5) Cost and feasibility of relocating the use to another site.

The relocation of the existing tenant is difficult since there are no buildings of comparable size (17,000 square feet) in the Newport Mesa Area to accommodate the

tenant's needs. Consequently, relocation of the existing uses would result in the additional costs to existing tenant and result in a substantial loss of revenue to the property owner.

RECOMMENDATIONS

As discussed in Finding and Considerations section above for the property, the applicant has presented information and a request to extend the abatement period. Staff recommends an extension period of ten years for 1499 Monrovia Avenue to February 1, 2022 is consistent with other extension requests previously approved and appropriate in this case.

That the request for the extension for ten years be approved based on the following findings and considerations:

1. That one year is not an adequate period of time to amortize the property owner's investment in the property.
2. That the property became nonconforming with the General Plan in 2006, 6 years ago, when the City Council adopted Resolution No. 2006-76 approving the "General Plan Update". The existing structure and use conformed to the Land Use Element of the General Plan for 49 years prior to the 2006 Update; and was not subject to abatement until 2008.
3. That the building could be modified to accommodate other commercial or nonresidential uses. However, the current building is not suitable for conversion from the existing commercial use to a residential building without demolishing and building new, or major renovation to provide adequate living areas and residential parking.
4. That the property is located in an area that is occupied by other nonresidential uses and public institutions; including the Coastline Community College Project and the proposed Banning Ranch Project, residential and mobile home park uses (across the street). It is anticipated that the continued commercial use of the subject property is compatible with the surrounding uses and will not have negative impact or pose harm on the neighboring residential and nonresidential uses in the vicinity.
5. That the office building has not posed negative impact on the neighboring uses.
6. That the relocation of the existing tenant is difficult since there are no buildings of comparable size in the Newport Mesa Area. Consequently, relocation of the existing uses would result in the additional costs to existing tenants and result in a substantial loss of revenue to the property owner as a result of the loss of rent.
7. That the abatement extension of ten years (February 1, 2022) is appropriate in this case since it will afford the property owner the ability to amortize the value of the building and other on site improvements (parking lot and landscape improvements), and the ability to negotiate leases, or to renegotiate the financing of the property.

CONCLUSION

Based on the information submitted by the applicant, adequate justification has been presented to extend the period of abatement. Therefore, in accordance with the provisions of Section 20.38.100 of the NBMC, the Hearing Officer may approve the request for extension of the abatement period based on the Findings and Consideration and testimony presented at the hearing. It is recommended that the Hearing Officer take the following action;

- Adopt the attached Resolution for the property located at 1499 Monrovia Avenue, based on the findings and considerations discussed in this report, approving the Abatement Period Extension to ten years, February 1, 2022 (See Attachment No. 1).


Environmental Review

The project is categorically exempt under Section 15301, of the California Environmental Quality Act (CEQA) Guidelines - Class 1 (Existing Facilities).

Public Notice

Notice of this hearing was published in the Daily Pilot, mailed to property owners within 300 feet of the property and posted at the site a minimum of 10 days in advance of this hearing consistent with the Municipal Code. Additionally, the item appeared upon the agenda for this meeting which was posted at City Hall and on the City website.

Prepared by:


Javier S. Garcia, AICP
Senior Planner

Submitted by:


Brenda Wisneski, AICP
Deputy Community Development Director

ATTACHMENTS

- PC 1 Draft Resolution Approving the Abatement Extension Request
- PC 2 Applicant's Extension Application and Supporting Information
- PC 3 Site Photos

: 12/21/11

DRAFT RESOLUTION APPROVING
THE ABATEMENT PERIOD EXTENSION
1499 MONROVIA AVENUE
(PA2011-152)

ATTACHMENT No. 1

RESOLUTION NO. HO 2012- ____

**A RESOLUTION OF A HEARING OFFICER OF THE CITY
OF NEWPORT BEACH APPROVING THE ABATEMENT
EXTENSION PERIOD FOR THE PROPERTY LOCATED AT
1499 MONROVIA AVENUE (PA 2011-152)**

WHEREAS, Chapter 20.38.100 of the Newport Beach Municipal Code (NBMC) requires nonconforming nonresidential uses in residential zoning districts to be abated and terminated upon the expiration of time periods identified by the NBMC. Following the issuance of an Abatement Order, Chapter 20.38.100 provides that a property owner may request an extension of the abatement period in order, to amortize a property owner's investment in the property and avoid an unconstitutional taking of property; and

WHEREAS, an application was filed by Kenneth M Kaplan, the owner of property located at 1499 Monrovia Avenue, and legally described as Parcel 2 of Lot Line Adjustment 2007-002, requesting an extension of the abatement period specified by the NBMC Section 20.38.100. If granted, the extension will allow the continued operation of existing commercial use for ten years from the date of the Hearing Officer's approval (February 1, 2022). The property is located in the RM (2420) Zoning District, where such nonresidential uses are not permitted; and

WHEREAS, a public hearing was held on February 1, 2012, in the City Hall Council Chambers, 3300 Newport Boulevard, Newport Beach, California. A notice of time, place and purpose of the meeting was given in accordance with the NBMC and other applicable laws. Evidence, both written and oral, was presented and considered at this meeting; and

WHEREAS, the hearing was presided over by Hon. John C. Woolley, retired Judge (California Superior Court, Orange County), Hearing Officer for the City of Newport Beach; and

WHEREAS, the findings and considerations of Section 20.38.100 (C.4(c)) of the NBMC and facts in support of the findings and considerations are as follows:

- 1. The length of the abatement period is not appropriate considering the owner's investment in the use;**

Facts in Support of Finding: The one year abatement period specified by the Municipal Code is not of sufficient duration to amortize the property owner's investment and the ability: to negotiate leases (which currently expire in September 2012), or to renegotiate the financing of the property (which will come due within the next year). Based on the information submitted by the applicant, staff recommends that an extension of 10 years for the abatement of the current use is necessary to avoid an unconstitutional taking of

the applicant's property; and to avoid the economic hardship that will result by the abatement of the nonresidential use which provides rental income.

- 2. The length of time the use was operating prior to the date of nonconformity justifies the extension of the abatement period beyond the code specified one year.**

Facts in Support of Finding: The property became nonconforming with the General Plan in 2006, 6 years ago, when the City Council adopted Resolution No. 2006-76 approving the "General Plan Update". The existing structure and use conformed to the Land Use Element of the General Plan for the 49 years prior to the 2006 update; and was not subject to abatement until 2008.

- 3. The existing structure is not suitable for conversion to an alternate use.**

Facts in Support of Finding: The building could be modified to accommodate other commercial or nonresidential uses. However, the age and configuration of the current building is not suitable for conversion from the existing commercial use to a residential building without demolishing and building new, or major renovation to provide adequate living areas and residential parking.

- 4. No harm to the public will result if the nonresidential uses remain beyond the one year abatement period.**

Facts in Support of Finding: The property is located in an area that is occupied nonresidential uses, residential uses and public institutions; including the Coastline Community College Project and Banning Ranch Project, and residential and mobile home park uses (across Monrovia Avenue). Continued commercial use of the subject property is compatible with the surrounding uses and will not have negative impact or pose harm on the neighboring residential and nonresidential uses in the vicinity.

- 5. The cost and feasibility of relocating the uses to another site cannot be accommodated within the one-year abatement period.**

Facts in Support of Finding: The relocation of the existing uses would be costly since there are no buildings of comparable size (17,000 square feet) in the Newport Mesa Area to accommodate the tenant's needs. Consequently, relocation of the existing uses would result in the additional costs to the existing tenant and result in a substantial loss of revenue to the property owner.

WHEREAS, this activity has been determined to be categorically exempt under the requirements of the California Environmental Quality Act under Class 1 (Existing

Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment (Section 15061(b)(3) of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

NOW THEREFORE, BE IT RESOLVED:

Section 1. The Hearing Officer of the City of Newport Beach hereby approves the requested Abatement Period Extension (PA2011-152), subject to the findings and considerations set forth above.

Section 2. The Abatement Period Extension for the property located at 1499 Monrovia Avenue, and legally described as Parcel 2 of Lot Line Adjustment 2007-002, is hereby extended for ten years and will expire on February 1, 2022, at which time all nonresidential use of the property shall cease or the building be demolished, unless an additional extension of the abatement period is granted; or an appropriate change in the Zoning District and the General Plan Land Use Designation are approved and adopted; or a change to the Zoning Regulations pertaining to nonconforming uses or their abatement are approved and adopted prior to that date.

Section 3. This action shall become final and effective fourteen (14) days after the adoption of this Resolution unless within such time an appeal is filed with the City Clerk in accordance with the provisions of Title 20, Planning and Zoning, of the Newport Beach Municipal Code.

APPROVED AND ADOPTED THIS _____ DAY OF _____ 2012.

By: _____
Hon. John C. Woolley, retired Judge
(California Superior Court, Orange County)
Hearing Officer for the City of Newport Beach

ATTEST:

City Clerk

**APPLICANT'S EXTENSION APPLICATION
AND ADDITIONAL INFORMATION**
1499 MONROVIA AVENUE
(PA2011-152)

ATTACHMENT No. 2



Abatement Period Extension Application

Planning Department

3300 Newport Boulevard, Newport Beach, CA 92663
(949) 644-3200 Telephone | (949) 644-3229 Facsimile
www.newportbeachca.gov

RECEIVED BY
COMMUNITY

AUG 10 2011

DEVELOPMENT
CITY OF NEWPORT BEACH

Property Owner/Applicant Name: <u>Kenneth M. Kaplan</u> Mailing Address: <u>361 Forest Avenue, Suite 204</u> <u>Laguna Beach, CA 92651</u> Phone: (949) <u>715-0770</u> Fax: (949) <u>715-0773</u> Email Address: <u>kaplankm@gmail.com</u>	Contact (if different) Name: _____ Mailing Address: _____ Phone: () _____ Fax: () _____ Email Address: _____
--	--

Owner's Affidavit

(I) ~~(We)~~ Kenneth M. Kaplan depose and say that (I am) ~~(we are)~~ the owner(s) of the property ~~(ies)~~ involved in this application. (I) ~~(We)~~ further certify, under penalty of perjury, that the foregoing statements and answers herein contained and the information herewith submitted are in all respects true and correct to the best of (my) ~~(our)~~ knowledge and belief.

Signature(s) _____

Kenneth M. Kaplan

Date 08/08/11

NOTE: An agent may sign for the owner if written authorization from the record owner is filed with the application.

Please answer the questions below. Attach additional sheets, if necessary.

1. Please describe how abatement of the use at this time relates to your investment in the use.

See letter dated August 8, 2011 from Peter D. Collisson, Esq. to James Campbell,
Acting Planning Director (the "Collisson Letter").

2. How long has the use been operating?

See Collisson Letter.

3. Please describe the suitability of the structure for an alternative use.

The building is suitable for office use only.

4. Please describe way there would be no harm to the public if the use remains beyond the abatement period.

See Collisson Letter.

5. Please describe the cost and feasibility of relocating the use to another site.

See Collisson Letter.

6. Is there any other evidence relevant to the determination of whether an extension of the abatement period is required to avoid an unconstitutional taking of property?

See Collisson Letter.

PETER D. COLLISSON
PROF. CORP.

ATTORNEY AT LAW
361 FOREST AVENUE, SUITE 204
LAGUNA BEACH, CA 92651-2148

TELEPHONE 949/250-7474
FACSIMILE 949/660-8001

EMAIL PETE@PDC-LAW.COM
FILE NO.: 1102,004-1

August 8, 2011

CERTIFIED MAIL RETURN
RECEIPT REQUESTED
NO. 7009096000042972764
AND FIRST CLASS MAIL

James Campbell
Acting Planning Director
Planning Department
3300 Newport Boulevard, Building C
Newport Beach, CA 92663

Re: 1499 MONROVIA AVENUE, NEWPORT BEACH, CA (424-401-014)
DOWNZONING FROM M-1-A TO RM (2420)

Dear Mr. Campbell:

I am writing on behalf of Kenneth M. Kaplan ("Mr. Kaplan" or "Kaplan"), owner of 1499 Monrovia Avenue, who retained my firm after receiving your letter of January 14, 2011 advising him that the zoning classification for his property had been changed from M-1-A to RM (2420). This letter addresses your position that "[t]he current non-residential use is no longer a permitted use" and "is subject to abatement."

The tenor of your January 14 letter is that you are prepared to meet with Mr. Kaplan to discuss a time extension of the abatement period and/or conversion of the use of the property to a residential use. Neither approach is consistent with applicable law. Mr. Kaplan and I have made a thorough analysis of the regulatory takings cases. Your legal advisors have undoubtedly told you about the limitations placed on municipal governments that want to downzone properties or force a change in their use through restrictive zoning. A careful and complete statement of these limitations was expressed in Taboe Keys Property Owners Association v. State Water Resources Control Board, 23 Cal. App. 4th 1459, 1483-4 (1994) as follows:

“... land use regulation must be prospective in nature because the state is constitutionally limited in the extent to which it may, through land use regulation, affect prior existing uses. Accordingly, preexisting use is a constitutional line of demarcation in land-use regulation and prior uses are protected while expectations and aspirations are not.”

Mr. Kaplan purchased the property on December 20, 2007 for \$5.8 million. The property is improved with an architecturally significant building that was built for and subsequently has been leased to Road and Track Magazine (“Road & Track”) for approximately 40 years. Needless to say, the Road & Track lease payments are substantial. In your letter to Road & Track, also on January 14, 2011, you have essentially told them to vacate the property by November 25, 2011 unless they engage in the expensive, time-consuming and uncertain process of appealing to your Department. The loss of Road & Track as a tenant would be devastating to Mr. Kaplan. His investment would provide him with no return at the same time he must maintain the payments on his loan. The downzoning would eliminate all expectations he had when he invested in the property. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 136 (1978). Further, California Code of Civil Procedure § 1263.205 makes it clear that the forced demolition of the building is a total taking of that asset.

It is unclear why this property, which has a building of approximately 17,000 square feet, is subject to downzoning at the same time that the City of Newport Beach (“City”) is permitting Coast Community College, the adjoining property owner to the north, to build a large Learning Center of approximately 55,000 square feet. Mr. Kaplan believes that the Kaplan/Road & Track property has been singled-out for no rational reason.¹

Simply put, the City’s action in sending the January 14, 2011 letters to both Mr. Kaplan and to Road & Track are discriminatory and functionally rendered Mr. Kaplan’s property unmarketable, unfinanceable and unrentable.

¹ In fact, the City’s attempt to impair the value of Mr. Kaplan’s property did not start with your January 14, 2011 letter. The City approved the Coast Community College project on then undeveloped land without requiring dedications for the extension of 15th Street to the boundary of the Banning Ranch on the then undeveloped property. As a result, any future extension of 15th Street will require a taking of a significant portion of the parking area of the Kaplan/Road & Track property resulting in severance damages that equal or approximate a total taking.

The simplest way for the City to get what it wants is to pay for it and, given your two January 14 letters, that is what it is obligated to do. As noted, Mr. Kaplan bought the property at the end of 2007 for \$5.8 million. The purchase price reflects a first class building with a high quality tenant producing a substantial income stream. Based on your assertion in each letter that "[t]he current non-residential use is no longer a permitted use," you are denying Mr. Kaplan any reasonable and beneficial use of the property.

In summary, the property has not changed since Mr. Kaplan purchased it – same land, same building, same tenant, same rental stream. The property has been functionally condemned by the City. The City should buy the property for \$5.8 million. This is the only way to allow the City to achieve its goal consistent with Mr. Kaplan's rights. While Mr. Kaplan is willing to meet with the City to discuss rescission of the actions taken by the City on November 25, 2010 and with respect to the Coastline Community College development adjacent to Mr. Kaplan's property, it is our belief that the City's actions have irrevocably harmed Mr. Kaplan in a manner that cannot be undone by either rescission or amendments to its general plan and zoning code to permit the existing use and the uses afforded Coastline Community College next door.

We hope to meet with you as soon as possible, because if you and Mr. Kaplan cannot reach a solution, Mr. Kaplan will take affirmative steps to protect his investment.

Very truly yours,



Peter D. Collisson

PDC/cm

cc: Mr. Kenneth M. Kaplan

SITE PHOTOS
1499 MONROVIA AVENUE (PA2011-152)



VIEWS FROM MONROVIA AVENUE

ATTACHMENT No. 3

Garcia, Jay

From: Betsy Malone [betsybythebeach@gmail.com]
Sent: Saturday, January 28, 2012 2:33 PM
To: Garcia, Jay
Subject: Abatement Period Extension for 1499 Monrovia Avenue

Hearing Date: February 1, 2012
Project File No. : PA2011-152
Abatement Period Extension
1499 Monrovia Avenue

Mr. Javier Garcia:

Pursuant to the public hearing notice received for an Abatement Period Extension for 1499 Monrovia Avenue, the Newport Knolls condominium community (located at the end of Monrovia Avenue and Halyard) supports the extension.

The current tenants, Car and Driver/Hearst Communications, and Kenneth Kaplan (owner) have been good neighbors for the past 10 plus years. The property is kept well maintained and there have been no complaints from our residents.

Best Regards,

Betsy Malone
Newport Knolls HOA, President
874 Halyard
Newport Beach, CA 92663

RECEIVED BY
COMMUNITY
JAN 30 2012
DEVELOPMENT
CITY OF NEWPORT BEACH

Peter D. Collisson, Esq./SBN 053322
 PETER D. COLLISSON PROF. CORP.
 361 Forest Ave., Ste 204
 Laguna Beach, CA 92651-2148
 Tel.: (949) 250-7474; fax: (949) 660-8001
 Email: pete@pdclaw.com

Attorney for Plaintiff Kenneth M. Kaplan

FILED
 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF ORANGE
 CENTRAL JUSTICE CENTER

DEC 21 2011

ALAN CARLSON, Clerk of the Court

BY F. IBARRA DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

30-2011

KENNETH M. KAPLAN, an individual,
 Plaintiff,
 vs.
 CITY OF NEWPORT BEACH, a municipality,
 and DOES 1-50, inclusive,
 Defendants.

CASE NO. 00531667

UNLIMITED JURISDICTION

Assigned to: Hon. BEREK W. HUNT
 DEPT. C24

**COMPLAINT IN INVERSE
 CONDEMNATION**

Hearing Date:
 Time:
 Dept.: C-
 Complaint Filed: _____, 2011
 Trial Date: N/A

Plaintiff alleges for causes of action:

FIRST CAUSE OF ACTION

*(Inverse Condemnation under California Constitution,
 Article 1, Section 19; Against All Defendants)*

1. Plaintiff is an individual who is a resident of the County of Orange and at all times relevant hereto is and has been since December 2007 the owner in fee simple of that certain real property located at 1499 Monrovia Avenue, Newport Beach, California which is referred to hereinafter as the "Real Property."

2. Plaintiff is informed and believes, and thereupon alleges, that Defendant City

1 of Newport Beach is a municipality organized and existing pursuant to the laws of the State
2 of California.

3 3. Plaintiff is ignorant of the true names and capacities of those defendants sued
4 herein as Does 1-50, inclusive, and therefore sues said defendants by those fictitious names.
5 Plaintiff will amend this complaint to allege their true names and capacities when
6 ascertained. Plaintiff is informed and believes and thereupon alleges, that each of the
7 fictitiously-named defendants is in some manner responsible for the injury and damage to
8 Plaintiff alleged herein.

9 4. The Real Property is more particularly described:
10 PARCEL 2 AS SHOWN ON EXHIBIT "A" OF LOT LINE ADJUSTMENT NO. LA 2007-
11 002, RECORDED OCTOBER 4, 2007 AS INSTRUMENT NO. 2007-598931 OF
12 OFFICIAL RECORDS, BEING A PORTION OF THE FOLLOWING DESCRIBED
13 PROPERTY:

14 LOT 1017 OF THE FIRST ADDITION TO NEWPORT MESA TRACT, AS SHOWN ON
15 A MAP RECORDED IN BOOK 8, PAGE 61 OF MISCELLANEOUS MAPS, RECORDS
16 OF ORANGE COUNTY, CALIFORNIA, TOGETHER WITH THAT PORTION OF THE
17 SOUTH ONE-HALF OF 15TH STREET, 60.00 FEET WIDE, ADJOINING SAID LOT
18 1017 ON THE NORTH, AS SAID 15TH STREET WAS VACATED AND ABANDONED
19 BY RESOLUTION NO. 67-863 OF THE BOARD OF SUPERVISORS OF ORANGE
20 COUNTY, CALIFORNIA, A CERTIFIED COPY OF WHICH WAS RECORDED
21 AUGUST 11, 1967 IN BOOK 8339, PAGE 801 OF OFFICIAL RECORDS OF SAID
22 ORANGE COUNTY, SAID PORTION LIES WESTERLY OF A LINE THAT RUNS
23 SOUTHERLY IN A DIRECT LINE FROM THE SOUTHEAST CORNER OF LOT 1016
24 OF SAID FIRST ADDITION TO NEWPORT MESA TRACT TO THE NORTHEAST
25 CORNER OF SAID LOT 1017.

26 TOGETHER WITH THE NORTH ONE-HALF OF 15TH STREET (60.00 FEET WIDE)
27 ADJOINING SAID LOT 1016 ON THE SOUTH, AS SAID 15TH STREET WAS
28 VACATED AND ABANDONED BY RESOLUTION NO. 67-863 OF THE BOARD OF

1 SUPERVISORS OF ORANGE COUNTY, CALIFORNIA, A CERTIFIED COPY OF
2 WHICH WAS RECORDED AUGUST 11, 1967 IN BOOK 8339, PAGE 801 OF OFFICIAL
3 RECORDS OF SAID ORANGE COUNTY, SAID PORTION LIES WESTERLY OF A
4 LINE THAT RUNS SOUTHERLY IN A DIRECT LINE FROM THE SOUTHEAST
5 CORNER OF SAID LOT 1016 TO THE NORTHEAST CORNER OF LOT 1017 OF SAID
6 FIRST ADDITION TO NEWPORT MESA TRACT.

7 A PORTION OF APN: 424-401-11

8 5. Plaintiff purchased the Real Property in December 2007 for a price that
9 reflected then-current commercial values for an architecturally significant two (2) story
10 commercial office building that was adequately parked, had dramatic views of the Pacific
11 Ocean and, most importantly, had a seasoned substantial income stream from a credit-worthy
12 tenant. The building had been constructed approximately 40 years ago by the then owners of
13 ROAD & TRACK MAGAZINE. That magazine has remained the sole occupant of that building
14 since its construction and has used the building continuously for the commercial,
15 nonresidential operation of publication of a magazine for auto enthusiasts. (Following initial
16 construction of the building, the original magazine owners sold and leased back the
17 building.) Plaintiff's lease with the owner of ROAD AND TRACK MAGAZINE enabled plaintiff
18 to obtain the financing needed for his purchase of the Real Property in 2007 (60% of the
19 purchase price paid by plaintiff for the Real Property). The lease also enabled plaintiff to
20 service that loan and afforded plaintiff a reasonable return on invested capital.

21 6. On October 26, 2010 defendants altered the zoning classification for the Real
22 Property and some of the surrounding area, changing it from M-1-A (commercial use) to
23 RM2420 (residential use), effective November 25, 2010. In January 2011, defendants
24 advised plaintiff and ROAD & TRACK MAGAZINE that the existing usage of the building on
25 the Real Property, which was nonconforming in terms of the revised zoning designation,
26 would have to cease on or before November 25, 2011. As a practical matter this meant that
27 the tenant, a commercial business, would have to vacate the premises, and that the sole
28 structure – the commercial office building – on the Real Property would have to be

demolished because of its incompatibility with the revised zoning for the Real Property. That office building is an "improvement pertaining to the realty," as that term is used in CCP §§ 1263.205(a), *et seq.* The impact of the zoning change by defendants is not prospective in effect only, but absolutely terminates pre-existing rights of usage of the Real Property by plaintiff and plaintiff's tenant, ends plaintiff's income stream and, therefore, imposes an economic impact that is both severe and that totally destroys the investment-backed expectations held by plaintiff when he acquired the Real Property. The actions taken to date by defendants have destroyed plaintiff's ability to lease, finance, improve, or sell the Real Property.

7. At the time of the zoning change, the real property adjoining plaintiff's Real Property (1515 Monrovia Avenue) was owned by Coastline Community College, which was then and still is in the process of constructing a campus facility, for nonresidential purposes, specifically for the operation of a post-secondary and vocational school. Defendants, however, did not require a comparable demolition or cessation of construction of commercial improvements on that adjoining property or require its owner to cease those nonresidential activities thereupon. Thus, plaintiff's Real Property has been singled out by defendants for disparate treatment, which is neither reasonable nor required for the achievement of the goals ostensibly justifying the zoning change implemented by defendants and affecting that property.

8. In January 2011 defendants notified plaintiff of the aforesaid zoning change, but also invited plaintiff to request an extension of the abatement period before the zoning change would become effective. Plaintiff made a timely application for such an extension on August 8, 2011; a true and correct copy of that application is attached hereto as Exhibit "1" and is incorporated herein by this reference. At no time have defendants responded to that application in any fashion whatsoever, aside from acknowledging their receipt of timely application. Accordingly, plaintiff has exhausted all administrative remedies available to him. No administrative claim by plaintiff of defendants is required by virtue of Gov't Code § 905.1. Plaintiff has advised defendants that the destruction of the improvements

1 upon the Real Property will destroy plaintiff's ability to generate rental income sufficient
2 either to pay the existing mortgage loan on that property or to construct new structures
3 consistent with the revised zoning on that property. Moreover, without first eliminating the
4 existing loan that encumbers the Real Property, plaintiff could not obtain a construction loan
5 that would be a prerequisite to any ability by plaintiff to construct new residential structures
6 upon the Real Property. Thus, the action by defendants, as aforesaid, eliminates the ability
7 by plaintiff to obtain any reasonable return on his investment in the Real Property, and has
8 the practical effect of leaving plaintiff with raw land encumbered by a mortgage that plaintiff
9 cannot service.

10 9. The aforesaid action by defendants imposes a permanent, substantial
11 diminution in value of plaintiff's Real Property. That change was both unreasonable and
12 unnecessary, in that defendants concurrently allowed the adjoining property to remain
13 exempt from the overall zoning change that defendants applied to plaintiff's property.

14 10. As a direct and proximate result of the aforesaid action by defendants to
15 plaintiff's Real Property, defendants have taken plaintiff's Real Property without tendering
16 just compensation therefor, in violation of plaintiff's rights under Article 1, Section 19, of the
17 California Constitution. Accordingly, plaintiff has been damaged in an amount in excess of
18 the minimum jurisdictional limit of this Court.

19 11. Plaintiff has received no compensation for the damage to the Real Property.

20 12. Plaintiff has incurred and will incur attorney's, appraisal and related fees
21 because of this proceeding in amounts that cannot yet be ascertained, which are recoverable
22 in this action under the provisions of CCP § 1036.

23 24 SECOND CAUSE OF ACTION

25 *(Inverse Condemnation under California Constitution,*

26 *Article 1, Section 19; Against All Defendants)*

27 13. Plaintiff realleges and incorporates herein by this reference those allegations
28 appearing above in paragraphs 1-12, inclusive, as though set forth herein at length.

1 14. To compound the injustice to plaintiff, defendants plan to take the entire
2 parking field in front of the building on plaintiff's Real Property for the planned extension of
3 15th Street in accordance with the conceptual plan attached hereto as Exhibit "2" (the 15th
4 Street Extension"). Such a taking will result in the inability of plaintiff to provide ROAD &
5 TRACK MAGAZINE (or any future tenant of the building) sufficient on site parking for the
6 building to either meet defendants' parking requirements for office buildings or to otherwise
7 satisfy the needs of ROAD & TRACK MAGAZINE. Defendants could have avoided this
8 prospective taking, which imposes an additional cloud on plaintiff's ability to either extend
9 the term of its lease with ROAD & TRACK MAGAZINE, find a new tenant, extend the term of
10 the existing financing, obtain new financing or market the Real Property for sale. Defendants
11 could have avoided this severe impact on plaintiff by moving the 15th Street Extension to the
12 then unimproved Coastline Community College site.

13 15. The aforesaid action by defendants will, when effectuated, impose a
14 permanent, substantial diminution in value of plaintiff's Real Property. That diminution is
15 both unreasonable and unnecessary.

16 16. As a direct and proximate result of the aforesaid action by defendants to
17 plaintiff's Real Property, defendants have taken plaintiff's Real Property without tendering
18 just compensation therefor, in violation of plaintiff's rights under Article 1, Section 19, of the
19 California Constitution. Accordingly, plaintiff has been damaged in an amount in excess of
20 the minimum jurisdictional limit of this Court.

21 17. Plaintiff has received no compensation for the imminent damage to the Real
22 Property.

23 18. Plaintiff has incurred and will incur attorney's, appraisal and related fees
24 because of this proceeding in amounts that cannot yet be ascertained, which are recoverable
25 in this action under the provisions of CCP § 1036.

THIRD CAUSE OF ACTION

(Inverse Condemnation under United States Constitution,

5th & 14th Amendments; 42 U.S.C. § 1983; Against All Defendants)

19. Plaintiff realleges herein as though set forth at length those allegations appearing in paragraphs 1-12, *supra*.

20. The aforesaid actions by defendants have also violated plaintiff's rights under the fifth and fourteenth amendments to the U.S. Constitution, and have deprived him of due process and equal protection of the law and just compensation, in violation of Section 1983 of Title 42 of the U.S. Code. Plaintiff is, therefore, entitled to recover, in addition to just compensation for the lost value of the Real Property, his attorney's, appraisal, and related fees, and costs of suit incurred herein pursuant to 42 U.S.C. § 1988.

FOURTH CAUSE OF ACTION

(Inverse Condemnation under United States Constitution,

5th & 14th Amendments; 42 U.S.C. § 1983; Against All Defendants)

21. Plaintiff realleges and incorporates herein by this reference those allegations appearing above in paragraphs 1-12, 14-15, 17-18, & 20, inclusive, as though set forth herein at length.

22. The aforesaid action by defendants will, when effectuated, impose a permanent, substantial diminution in value of plaintiff's Real Property. That change is both unreasonable and unnecessary.

23. As a direct and proximate result of the aforesaid action by defendants to plaintiff's Real Property, defendants have taken plaintiff's Real Property without tendering just compensation therefor, in violation of plaintiff's rights under the U.S. Constitution, 5th & 14th Amendments, and Title 42 of the U.S. Code.

24. Plaintiff has incurred and will incur attorney's, appraisal and related fees because of this proceeding in amounts that cannot yet be ascertained, which are recoverable in this action under the provisions of 42 U.S.C. § 1988.

FIFTH CAUSE OF ACTION*(Declaratory Relief; To All Defendants)*

25. Plaintiff realleges herein as though set forth at length those allegations appearing in paragraphs 1-11, *supra*.

26. By virtue of the aforescribed zoning change, defendants have effected a total taking without compensation of plaintiff's Real Property. By so doing, defendants have enacted a regulation (the zoning change) that, when applied to plaintiff's Real Property, unconstitutionally deprives plaintiff of his protected rights. Accordingly, in the absence of payment of just compensation to plaintiff for said deprivation, the zoning change described above should be declared by this Court to be unconstitutional insofar as it applies to the Real Property.

27. Plaintiff is informed and believes, and thereupon alleges, that defendants contend otherwise and, therefore, a judicial declaration by this Court of the respective rights and duties of the parties is needed. Plaintiff has no available administrative remedies.

SIXTH CAUSE OF ACTION*(Declaratory Relief; To All Defendants)*

28. Plaintiff realleges and incorporates herein by this reference those allegations appearing above in paragraphs 1-11, 14-15, 17-18, & 20, inclusive, as though set forth herein at length.

29. By virtue of the aforescribed taking of the portion of the Real Property needed for the street extension, defendants have effected a total taking without compensation of plaintiff's Real Property. By so doing, defendants are extending a street and in the process taking a portion of plaintiff's Real Property and rendering the remaining portion valueless, which unconstitutionally deprives plaintiff of his protected rights. Accordingly, in the absence of payment of just compensation to plaintiff for said deprivation, the taking described above should be declared by this Court to be unconstitutional insofar as it applies to the Real Property.

1 30. Plaintiff is informed and believes, and thereupon alleges, that defendants
2 contend otherwise and, therefore, a judicial declaration by this Court of the respective rights
3 and duties of the parties is needed. Plaintiff has no available administrative remedies.

4
5 WHEREFORE, plaintiff prays judgment against defendants as follows:

- 6 1. For damages in an amount according to proof, and in excess of the minimum
7 amount required for the jurisdiction of this Court, with interest thereon at the
8 legal rate from the date of the damages;
9 2. For a declaration of the parties' rights and duties, as described above;
10 3. For reasonable attorney's, appraisal, and other related fees according to proof;
11 4. For costs of suit incurred herein; and
12 5. For such other and further relief as this Court may deem just and proper.

13 DATED: December 20, 2011

PETER D. COLLISSON PROF. CORP.


14
15 By: 

16 Peter D. Collisson
17 Attorney for Plaintiff
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION

I, the undersigned, declare that I have personal knowledge of each of the facts set forth in the foregoing complaint and know the same to be true, except as to those facts alleged upon information and belief, and as to those I believe the same to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed on this 20th day of December 2011.


Kenneth M. Kaplan

PETER D. COLLISSON
PROF. CORP.

ATTORNEY AT LAW
361 FOREST AVENUE, SUITE 204
LAGUNA BEACH, CA 92651-2148

TELEPHONE: 949/250-7474
FACSIMILE: 949/660-8001

EMAIL: PETE@PDCLAW.COM
FILE NO.: 1102.004-1

August 8, 2011

CERTIFIED MAIL RETURN
RECEIPT REQUESTED
NO. 7009096000042972764
AND FIRST CLASS MAIL

James Campbell
Acting Planning Director
Planning Department
3300 Newport Boulevard, Building C
Newport Beach, CA 92663

Re: 1499 MONROVIA AVENUE, NEWPORT BEACH, CA (424-401-014)
DOWNZONING FROM M-1-A TO RM (2420)

Dear Mr. Campbell:

I am writing on behalf of Kenneth M. Kaplan ("Mr. Kaplan" or "Kaplan"), owner of 1499 Monrovia Avenue, who retained my firm after receiving your letter of January 14, 2011 advising him that the zoning classification for his property had been changed from M-1-A to RM (2420). This letter addresses your position that "[t]he current non-residential use is no longer a permitted use" and "is subject to abatement."

The tenor of your January 14 letter is that you are prepared to meet with Mr. Kaplan to discuss a time extension of the abatement period and/or conversion of the use of the property to a residential use. Neither approach is consistent with applicable law. Mr. Kaplan and I have made a thorough analysis of the regulatory takings cases. Your legal advisors have undoubtedly told you about the limitations placed on municipal governments that want to downzone properties or force a change in their use through restrictive zoning. A careful and complete statement of these limitations was expressed in Tahoe Keys Property Owners Association v. State Water Resources Control Board, 23 Cal. App. 4th 1459, 1483-4 (1994) as follows:

“... land use regulation must be prospective in nature because the state is constitutionally limited in the extent to which it may, through land use regulation, affect prior existing uses. Accordingly, preexisting use is a constitutional line of demarcation in land-use regulation and prior uses are protected while expectations and aspirations are not.”

Mr. Kaplan purchased the property on December 20, 2007 for \$5.8 million. The property is improved with an architecturally significant building that was built for and subsequently has been leased to Road and Track Magazine (“Road & Track”) for approximately 40 years. Needless to say, the Road & Track lease payments are substantial. In your letter to Road & Track, also on January 14, 2011, you have essentially told them to vacate the property by November 25, 2011 unless they engage in the expensive, time-consuming and uncertain process of appealing to your Department. The loss of Road & Track as a tenant would be devastating to Mr. Kaplan. His investment would provide him with no return at the same time he must maintain the payments on his loan. The downzoning would eliminate all expectations he had when he invested in the property. *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 136 (1978). Further, California Code of Civil Procedure § 1263.205 makes it clear that the forced demolition of the building is a total taking of that asset.

It is unclear why this property, which has a building of approximately 17,000 square feet, is subject to downzoning at the same time that the City of Newport Beach (“City”) is permitting Coast Community College, the adjoining property owner to the north, to build a large Learning Center of approximately 55,000 square feet. Mr. Kaplan believes that the Kaplan/Road & Track property has been singled-out for no rational reason.¹

Simply put, the City’s action in sending the January 14, 2011 letters to both Mr. Kaplan and to Road & Track are discriminatory and functionally rendered Mr. Kaplan’s property unmarketable, unfinanceable and unrentable.

¹ In fact, the City’s attempt to impair the value of Mr. Kaplan’s property did not start with your January 14, 2011 letter. The City approved the Coast Community College project on then undeveloped land without requiring dedications for the extension of 15th Street to the boundary of the Banning Ranch on the then undeveloped property. As a result, any future extension of 15th Street will require a taking of a significant portion of the parking area of the Kaplan/Road & Track property resulting in severance damages that equal or approximate a total taking.

The simplest way for the City to get what it wants is to pay for it and, given your two January 14 letters, that is what it is obligated to do. As noted, Mr. Kaplan bought the property at the end of 2007 for \$5.8 million. The purchase price reflects a first class building with a high quality tenant producing a substantial income stream. Based on your assertion in each letter that "[t]he current non-residential use is no longer a permitted use," you are denying Mr. Kaplan any reasonable and beneficial use of the property.

In summary, the property has not changed since Mr. Kaplan purchased it – same land, same building, same tenant, same rental stream. The property has been functionally condemned by the City. The City should buy the property for \$5.8 million. This is the only way to allow the City to achieve its goal consistent with Mr. Kaplan's rights. While Mr. Kaplan is willing to meet with the City to discuss rescission of the actions taken by the City on November 25, 2010 and with respect to the Coastline Community College development adjacent to Mr. Kaplan's property, it is our belief that the City's actions have irrevocably harmed Mr. Kaplan in a manner that cannot be undone by either rescission or amendments to its general plan and zoning code to permit the existing use and the uses afforded Coastline Community College next door.

We hope to meet with you as soon as possible, because if you and Mr. Kaplan cannot reach a solution, Mr. Kaplan will take affirmative steps to protect his investment.

Very truly yours,

A handwritten signature in black ink, appearing to read "P. D. Collisson", written in a cursive style.

Peter D. Collisson

PDC/cm

cc: Mr. Kenneth M. Kaplan



Abatement Period Extension Application

Planning Department

3300 Newport Boulevard, Newport Beach, CA 92663
(949) 644-3200 Telephone | (949) 644-3229 Facsimile
www.newportbeachca.gov

Property Owner/Applicant	Contact (if different)
Name: <u>Kenneth M. Kaplan</u>	Name: _____
Mailing Address: <u>361 Forest Avenue, Suite 204</u> <u>Laguna Beach, CA 92651</u>	Mailing Address: _____
Phone: (949) <u>715-0770</u>	Phone: () _____
Fax: (949) <u>715-0773</u>	Fax: () _____
Email Address: <u>kaplankm@gmail.com</u>	Email Address: _____

Owner's Affidavit

(I) ~~(We)~~ Kenneth M. Kaplan depose and say that (I am) ~~(we are)~~ the owner(s) of the property ~~(ies)~~ involved in this application. (I) ~~(We)~~ further certify, under penalty of perjury, that the foregoing statements and answers herein contained and the information herewith submitted are in all respects true and correct to the best of (my) ~~(our)~~ knowledge and belief.

Signature(s) *Kenneth M. Kaplan* Date 08/08/11
Kenneth M. Kaplan

NOTE: An agent may sign for the owner if written authorization from the record owner is filed with the application.

Please answer the questions below. Attach additional sheets, if necessary.

1. Please describe how abatement of the use at this time relates to your investment in the use.

See letter dated August 8, 2011 from Peter D. Collisson, Esq. to James Campbell,
Acting Planning Director (the "Collisson Letter").

2. How long has the use been operating?

See Collisson Letter.

3. Please describe the suitability of the structure for an alternative use.

The building is suitable for office use only.

4. Please describe way there would be no harm to the public if the use remains beyond the abatement period.

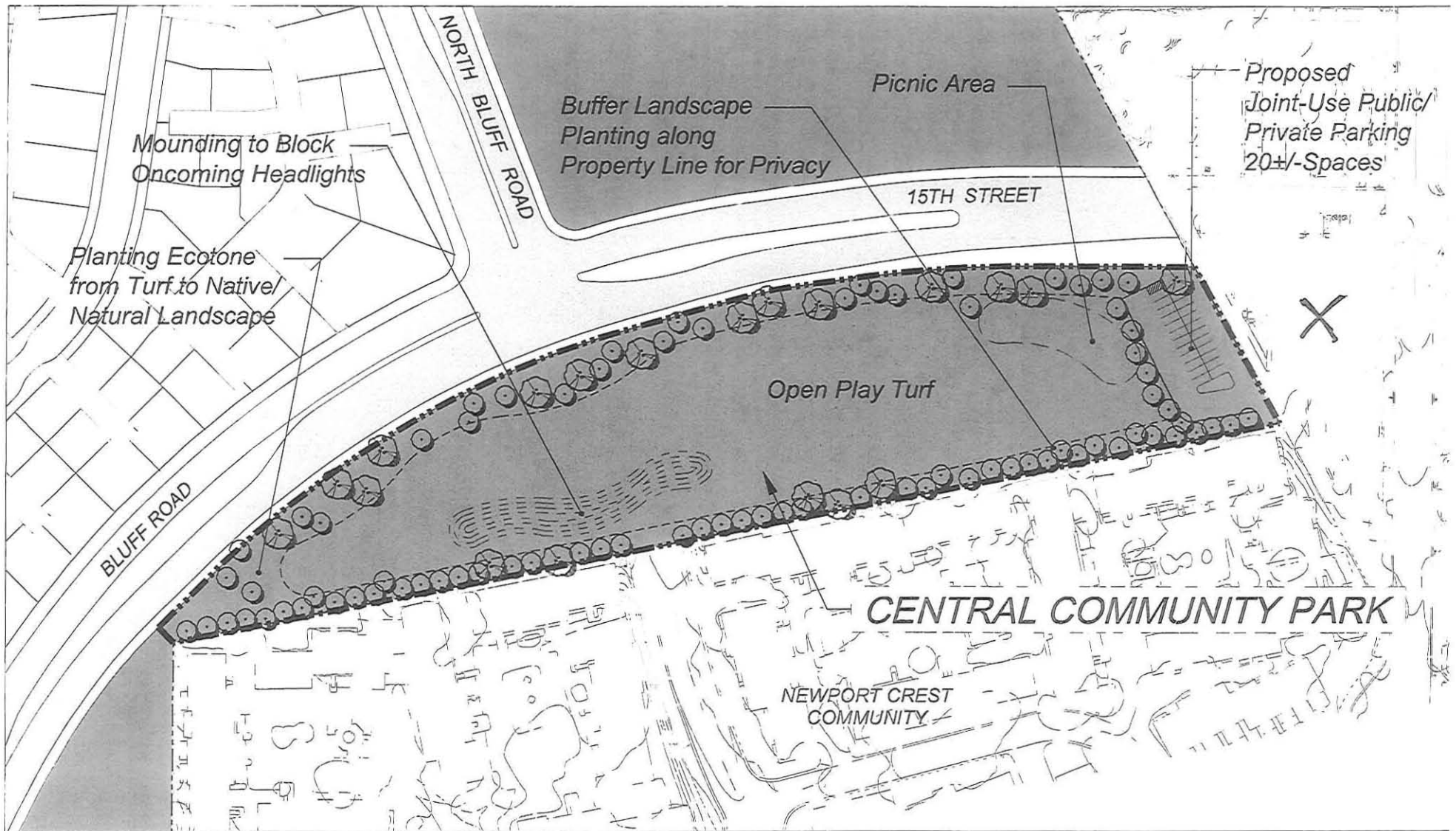
See Collisson Letter.

5. Please describe the cost and feasibility of relocating the use to another site.

See Collisson Letter.

6. Is there any other evidence relevant to the determination of whether an extension of the abatement period is required to avoid an unconstitutional taking of property?

See Collisson Letter.

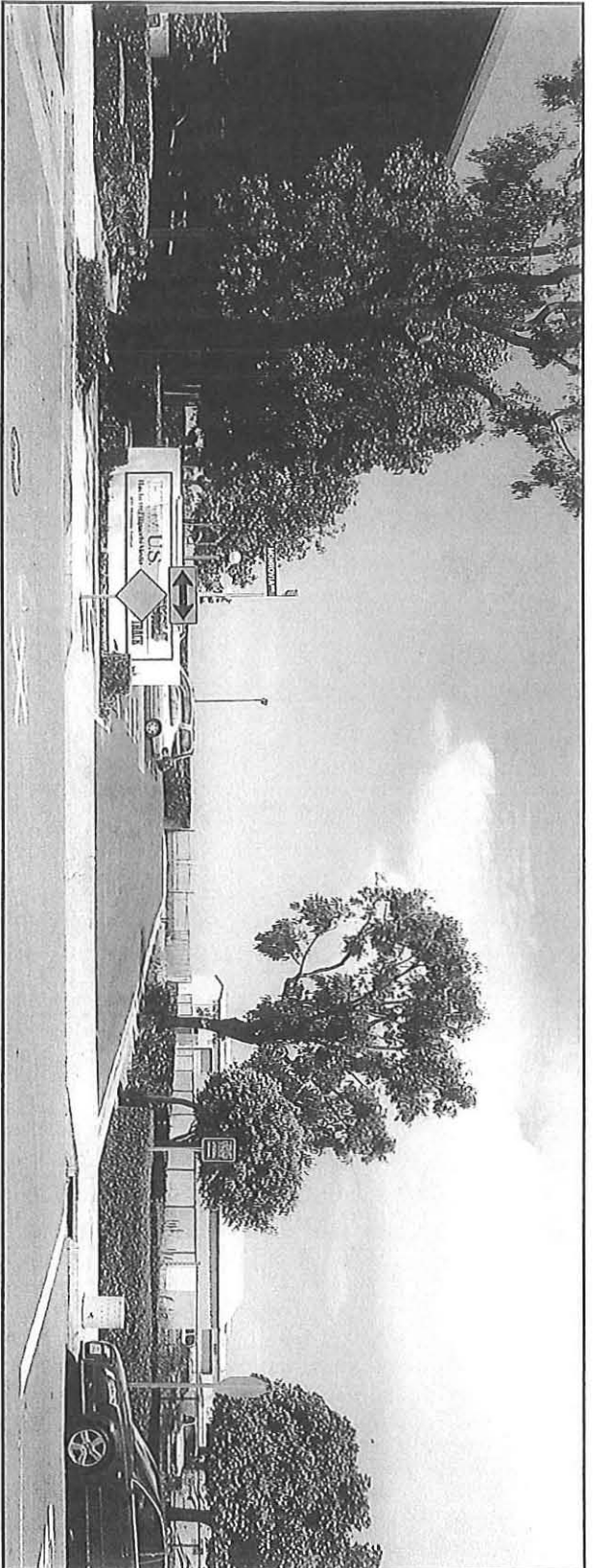


NEWPORT BANNING RANCH

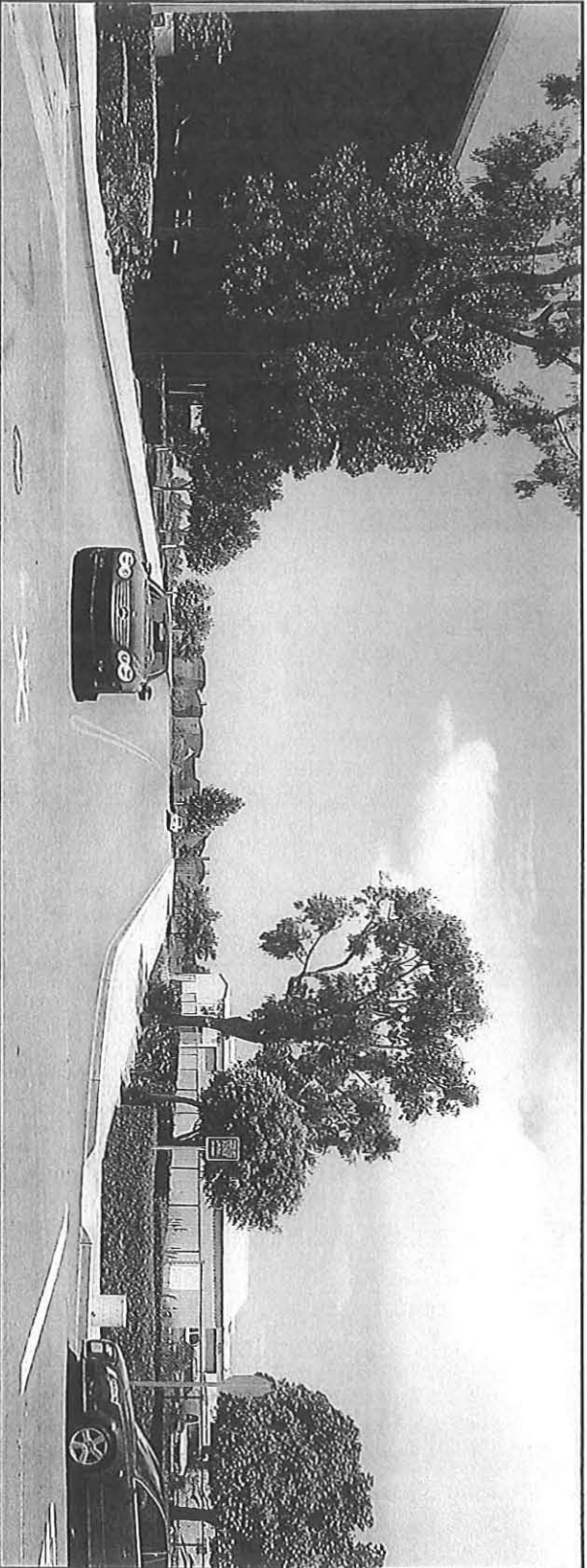
MASTER DEVELOPMENT PLAN
City of Newport Beach - California

Exhibit 3-6I Central Community Park Project Development Plan

0 60 120    2011.06



Existing View



Proposed View